(4)

No. 99-1946-CFX Title: Edward Chen, et al., Petitioners
v.
City of Houston, et al.

Docketed: June 6, 2000 Court: United States Court of Appeals for the Fifth Circuit

Entry	Date	Proceedings and Orders
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(1)

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No. 99-

IN THE

Supreme Court of the United States

EDWARD CHEN, *et al.*,
Petitioners,

v.

CITY OF HOUSTON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether in light of *Hunt v. Cromartie*, 526 U.S. 541 (1999), the Court below erred to conclude, despite substantial circumstantial and direct evidence, that no fact issue was created concerning whether race predominated over traditional race-neutral principles in the construction of the 1997 City of Houston single member council districts.

Whether single member city council districts which vary in adult citizen population by greater than 30 percent violate the voter equality requirements of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Whether the race-based action of the City of Houston to underpopulate districts with mostly racial minorities and overpopulate mostly non-Hispanic white districts, while within a 10 percent variation on total population, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDING

Petitioners are Edward Chen, Jon Taylor, Edward Blum, Barbara L. Thomas, Al Vera, Kenneth M. Powers, James White, Herschel Smith, Bill Wiener, Bernard Loebe, Chester Wrye, and Edward Robert.

Respondents are City of Houston, Hon. Lee P. Brown, Hon. Bruce Tatro, Hon. Carol Mims Galloway, Hon. Mark Goldberg, Hon. Jew Don Boney, Hon. Rob Todd, Hon. Mark Ellis, Hon. Bert Keller, Hon. Gabriel Vasquez, Hon. John Castillo, Hon. Annise Parker, Hon. Gordon Quan, Hon. Orlando Sanchez, Hon. Chris Bell, and Hon. Carroll Robinson.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Fifth Circuit opinion is reported at *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000), and appears in the Appendix at 1a. The district court opinion is reported at *Chen v. City of Houston*, 9 F. Supp. 2d 745 (S.D. Tex. 1998), and appears in the Appendix at 53a.

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on March 9, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254 (1) and 2106.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which provides in relevant part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On April 9, 1997, the City of Houston adopted a redistricting ordinance which was challenged the same day in federal district court by Petitioners as an unconstitutional segregation of voters in violation of the Equal Protection Clause of the Fourteenth Amendment as interpreted by *Shaw v. Reno*, 509 U.S. 630 (1993), *Miller v. Johnson*, 515 U.S. 900 (1995),

and subsequent cases. The City adopted a further revision in 1999 to conform to some minor precinct boundary changes.[1] The City will again redistrict in advance of elections scheduled for November 2001. The City of Houston is subject to Section 5 of the Voting Rights Act, 42 U. S. C. § 1973c, and thus must seek preclearance for all redistricting changes.

A. Characteristics of the Plan

Houston elects nine city council members from single member districts. Five more members and a mayor are elected at-large. The districts vary widely in their adult citizen populations[2], from a high of 134,744 in District G to a low of 96,712 in District H and 96,242 in District I. Doc. 68, Ex. G.[3]

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1 While the City no longer uses the 1997 plan, this matter is not moot, as the 1999 districts change only five of the districts slightly to conform to altered voting precinct lines, with no precinct change involving greater than 3000 persons. Measured by voting age population, the largest racial group in each minority district changed less than one half a percent, and adult citizen variations among the districts, *infra* at n.4, also do not change. The precleared 1999 districts are thus essentially identical in racial character and geographic construction to the 1997 plan, and will serve as the yardstick from which to measure retrogression for any future plan. *See Reno v. Bossier Parish*, ___ U.S. ___, at ___, 120 S. Ct. 866, 871, 145 L. Ed. 2d 845, 856 (2000). "Like other cases challenging electoral practices, therefore, this controversy is not moot because it is 'capable of repetition, yet evading review.'" *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996) (citations omitted). Indeed, as the city historically redistricts each two years, the harm to Petitioners is not just capable of repetition, but has actually been repeated. This case was filed the day the challenged plan was adopted, and has been pursued diligently ever since.

2 Adult citizens, or "citizen voting age population," is abbreviated CVAP. Adults, or "voting age population," is abbreviated VAP.

3 Doc ___ refers to the district court docket number for each pleading.

The maximum deviation on this measure of population is thus greater than 32.5 percent.[4] District G is 87.2 percent Anglo[5], while Districts H and I are 40.0 and 40.6 percent Hispanic, respectively, measured by adult citizens. Measured by total population, the three districts are 79.1 percent Anglo, and 58.8 and 59.1 percent Hispanic, respectively. *Id.*

The 32.5 percent variance is a result of the intersection of high noncitizenship rates among certain groups, primarily Hispanics and Asians, and the conscious creation of separate Hispanic districts to comply with an interpretation of the Voting Rights Act. Measured by total population, however, the districts have 8.63 percent maximum deviation. "Houston's 1990 census evidence shows that 45.8% of voting-age Hispanic Houston residents were noncitizens and ineligible to vote. By comparison, 2.2 percent of the non-Hispanic Anglo voting-age population and 1.6 percent of the non-Hispanic black voting-age population were noncitizens." *Campos v. City of Houston*, 113 F.3d 544, 547 (5th Cir. 1997).

The plan uses a number of narrow connectors. In at least two instances, involving Districts B and C, contiguity is achieved by a touch at a single point. Doc. 29, Exh. 1; Doc. 1, p. 6, ¶ 31; Doc. 8, p. 3. Anglo majority District E bypasses predominantly black District B and Hispanic District I. Kingwood and adjacent neighborhoods in the far northeast of the City are connected by an unpopulated man-made canal to

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4 Even taking into account the at-large component of representation, a nearly 20% maximum deviation remains when evaluated by adult citizens. *See Board of Estimate v. Morris*, 489 U.S. 688 (1989).

5 The term "Anglo" is applied to all non-Hispanic and non-Asian Caucasian persons, thus encompassing those of Polish ancestry, such as Mr. Gorczynski, *infra* at 4, as well as those with ancestry from Scandinavia, Germany, Greece, Italy or Israel.

several small communities (Cimmaron and Hidden Forest) near the San Jacinto River and Interstate Highway 10. These areas are in turn connected with a thin land bridge on the eastern border of the Galena Park City limits to the Houston Ship Channel. District E works south and then funnels through a one block wide connector at Airport Boulevard and Interstate Highway 45 South (Gulf Freeway) to reach to the southernmost section of District E, which forms the populated remainder of the district. Doc. 1, p. 6, ¶ 26; Doc. 8, p. 2. District B connects the mostly African-American population in the northwest of the City, including Acres Homes, by a thin connector to the mostly African-American population east of Highway 59. Doc. 1, p. 6, ¶ 30; Doc. 8, p. 3. A western section of District H is attached to the main body by an uninhabited section of Loop 610 highway between East and West T. C. Jester Boulevards. Doc. 1, p. 7, ¶ 35; Doc. 8, p. 3.

B. Houston's History of Redistricting in the 1990s

Since single member districts were adopted in 1979 during preclearance for annexation of Clear Lake City, there have been at least two majority black districts and one majority Hispanic district. The inclusion of a second district with a majority total Hispanic population came in 1991 as a result of the refusal of the Department of Justice to preclear an earlier, preferred plan with one majority Hispanic district and another racially mixed district, District H. An "Anglo" council member, Dale Gorczynski, and later by appointment, his wife, Cynthia Canales Gorczynski, a Hispanic, represented the prior district. All representatives since 1993 have been Hispanic, and also each has been the candidate of choice of the Hispanic voters residing within District H. Candidates of other racial groups rarely compete in the ethnically and racially identified districts. Doc. 29, at 14.

After receipt of the 1990 census, the City sought to reconfigure its nine single member districts into new districts of roughly equivalent total population. Purportedly to compensate for an expected difference in the undercount of minority persons, (Doc. 68, Ex. I; Doc. 8, p. 5, ¶ 61) districts represented by minority politicians were made smaller in size. Doc. 29, Exs. 8, 9, 10, 11; Doc. 57, Vol. II, Ex. 11A and 11B; Doc. 29, Ex. 26-28; Doc. 61, Ex. A. However, no similar adjustment in size was made to districts with substantial minority populations which were represented by Anglos. *Id.* In the 1993 plan all four minority districts are undersized, and by the 1997 plan Districts B, H, and I are below the average in total population and are the three lowest in voting age population. *Id.* That minority District D was not undersized in 1997 is the exception which proves the rule, and is the result of the refusal of the minority incumbent to relinquish any territory to District C, in order not to lose access to certain prominent Houstonians residing in the precincts marked for removal. Doc. 68, Ex. A, pp. 367-368.

The City agreed on a plan, but certain Hispanic voters objected and filed suit. The Department of Justice on October 4, 1991 "refused to preclear Houston's Plan #2 because it contains only one 'safe' Hispanic district," noting that two districts with Hispanic voting age majorities would provide "substantially greater electoral opportunity." *U.S. v. City of Houston*, 800 F. Supp. 504, 507 n.7 (5th Cir. 1992) (criticizing the Justice Department position which "assumes that the legal standard in Section 5 cases is to maximize minority representation"); Doc. 30 [Ex. 7A to Plaintiffs' Motion for Preliminary Injunction, Declaration of Dr. Ronald E. Weber], at p. 16. Although the City acquiesced to the objection and adopted another plan, Plan #3, just before the scheduled elections, and although this plan was precleared by the Department of Justice at the eleventh hour on October 12,

1991, the local federal District Court implemented the unprecleared July 1991 plan (Plan #2) for the November 1991 elections. *Campos v. City of Houston*, 776 F. Supp. 304 (S.D. Tex. 1991). The essential change in the October 1991 plan was the shift of District H from a relatively compact multiracial district to a more contorted district with a majority Hispanic voting age population. Doc. 1, p. 7, ¶ 33; Doc. 8, p. 3; Doc. 30, p. 18, Table 1. Although the October 1991 plan was not used in 1991, it was implemented with minor adjustments in the 1993, 1995, 1997, and now 1999 plans.

Further minor changes ensued until 1997, when the City annexed Kingwood. Because of small annexations and constant changes in Harris County voting precinct boundaries, the City each two years has made adjustments to the district boundaries. The City has described these plans as "minimal change" plans. Doc. 29, Ex. 11. The demographics and essential geographic appearance of the districts have remained constant. Over vocal opposition, the City absorbed Kingwood, an area with more than 40,000 residents, and two smaller minority areas touching the City on the northeast in December 1996. This added population caused the districts to exceed a 10 percent variance, measured by total population. A few voting precinct changes also forced slight changes to district boundaries.

The process of developing the 1997 plan differed from the approach of prior years. The computer used to construct the 1997 plan contains racial and ethnic data, but not data concerning voting behavior, household income or value, or socioeconomic status. Doc. 1, pp. 7-8, paragraphs 38-41; Doc. 8, p. 3. Mr. Jerry Wood in the city planning department began by attaching each annexed area to the most proximate district, as has been the custom. All other annexations in the 1990s have ultimately been added to the most proximate district. Doc. 57, Vol. II, Ex. 17, pp. 102-03. Thus, Kingwood was added first

to District B. Indeed, the "largely Anglo population surrounding Lake Houston was a part of District B prior to the Kingwood annexation." Doc. 29, Ex. 33, p. 10.

The continued inclusion of Kingwood would cause a reduction in the total black population percentage of District B to approximately 50 percent. Mr. Wood presented a map to Ms. Helen Gros of the city Legal Department, who rejected the concept as being retrogressive. Doc. 67, Ex. C, pp. 98-101. No new analysis of current levels of racially polarized voting was conducted. Instead, a new plan was constructed adding parts of Montgomery County and Kingwood in the northeast of the city to District E in the southeast of the city, using a canal for a connector. Only then was the plan shown to council members, a few of whom asked for shifting of a few precincts. Doc. 68, Ex. A, p. 368. After the unveiling of the plan, but before its formal adoption, a comparison of the socioeconomic characteristics of Kingwood to sections of Districts B and E was undertaken by Peer Chacko, a planning department employee.

The City's own public statements have consistently emphasized the racial and ethnic character of the various, nearly identical plans drafted from October 1991 forward. The ethnic changes made in 1991 are reflected in Doc. 30, Table 1. A City attorney in 1993 openly acknowledged "a primary City objective to enhance the opportunity for increased Hispanic representation in City government . . . ." Doc. 30, p. 19. To accommodate other racially gerrymandered plans for U. S. Congress, and the state house and senate, many precincts were subdivided for the elections of 1992. These more racially and ethnically homogenous precincts permitted the City to corral all but "a few isolated blocks with high Hispanic population" into the Hispanic districts. Doc. 30, pp. 19-22. The City describes its move of Precinct 82 to District H in 1993 as an

accommodation because "*Hispanic* witnesses" testified in favor of the proposal in 1993. Doc. 29, Ex. 32, p. 9 (emphasis added). In federal court pleadings, the City asserted the plans under consideration in 1993 "improve on Plan 3 by increasing the likelihood that Hispanic citizens will be able to elect the candidates of their choice in Districts H and I." Doc. 57, Ex. 8B, p. 3. Moreover, in the Section 5 submission, the City in 1995 explained that certain changes were not adopted because they did not "clearly add[] to Hispanic voting strength." Doc. 29, Ex. 32, p. 9, n.3. The narrative further notes the effect of the realignment of precincts in 1995 was a slight increase in Hispanic VAP in District H. The City then selected precinct 181 as the precinct to equalize population for District I. "It is the election precinct with the largest Hispanic VAP percentage that is contiguous and can be added to District I." Doc. 29, Ex. 32, p. 11.

C. Houston's Political Environment

Houston has a robust history of electing candidates of choice of Hispanic and black voters for over 20 years. In a city where blacks are nearly 30 percent of the adult citizens, and Hispanics are slightly more than 15 percent, candidates of each racial group have defeated candidates of each other racial group for the at-large positions. Since 1989 in contests for the at-large positions Hispanics have defeated blacks (Saenz v. Clark, 1991; Sanchez v. Burks, 1997, 1999), blacks have defeated Hispanics (Jackson Lee v. Castillo, 1989), blacks have defeated whites (Clark v. Westmoreland, 1989; Robinson v. Kelley, 1991; Peavey v. Tyra, 1995), whites have defeated blacks (Bell v. Dixon, 1997; Bell v. Johnson, 1997; Roach v. Wright, 1997), Hispanics have defeated whites (Sanchez v. Ballard, 1995), whites have defeated Hispanics (Kelley v. C. Gorczynski, 1993), and Asians have defeated blacks (Quan v. Boykins, 1999).

The same pattern is true in other partisan and nonpartisan elections in Harris County. Candidates preferred by African-American voters have regularly won election as mayor of the City of Houston over the past two decades, with the notable exception of 1991. In a 22% black district F in the 1997 city council run off election, a black candidate took nearly 48% of the vote. *Id.* at Tab D. Every district in Harris County since 1988 which has been 39.6% black or greater in citizen voting age population has elected a black officeholder. Doc. 67, Ex. A, Table 15. In 86 of 86 elections held in Harris County from 1988 to 1996 in districts where blacks comprised 39.6% or more of the citizens of the district, a black candidate won. Every district in Harris County since 1998 which has been 43.2% or greater Hispanic by citizen voting age population has elected a Hispanic officeholder, and each has been the preferred candidate of Hispanic voters. *Id.* at Table 16. Analysis by Dr. Ronald E. Weber[6] further established that the candidate preferred by voters of the group always wins where the district is 35.8% black or 33.5% Hispanic in CVAP, respectively. Finally, he found that candidates preferred by the racial or ethnic group usually win at 20.0% black and 15.4% Hispanic adult citizen levels, respectively. Doc. 67, Ex. A, p. 90.

Houston's city leaders have roughly proportionately reflected the racial character of the community for decades. Based on the 1990 census, the total population of the City of Houston in 1997 is 42.2% white, 26.7% black, and 26.8%

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6 Dr. Weber is a noted expert political scientist, and has offered testimony to federal courts in segregated congressional district cases in North Carolina, Louisiana, Georgia, Texas, and Virginia. His determination "that a significant number of persons are assigned to districts in the City of Houston based on race and ethnicity" and traditional principles subordinated is amply supported by the evidence, raises an issue for trial, and should not be weighed at the summary judgment stage. Doc. 84, p. 31.

Hispanic. Doc. 57, Vol. II, Ex. 11C. The voting age population is 47.2% Anglo, 25.2% black, and 23.4% Hispanic. *Id.* Prior to the annexations in 1996, the adult citizens of Houston were 52.5% Anglo, 29.8% non-Hispanic black, 15.3% Hispanic, and 2.3% from other groups including Asians. Doc. 1, p. 8, ¶ 45; Doc 8, p. 4. At the time this suit was filed the mayor was Anglo, and the council had four Hispanics, three blacks, six Anglos, and an Asian. At the present time the mayor is black, and the council has three Hispanics, three blacks, seven Anglos, and an Asian. Doc 67, Tab A, pp. D-10 to D-15.

D. Proceedings Below

This case was filed April 9, 1997 on the day of the adoption of the new redistricting plan, Ordinance 97-369, and before the Department of Justice granted preclearance July 7, 1997. Jurisdiction was predicated on Title 28 U.S.C. §§ 1331 and 1343(3). The district court denied a Motion for Preliminary Injunction on October 3, 1997 without holding an evidentiary hearing, and discovery ensued. At a pretrial conference on March 27, 1998, the district court set the case for trial June 8, 1998, but then on May 6, 1998 it granted all motions for summary judgment previously filed by the City on March 2, 1998.

The Petitioners filed notice of appeal on May 20, 1998, and sought review by the Fifth Circuit Court of Appeals of the *Shaw* claims regarding segregated voting districts and two separate claims based upon the doctrine of one person, one vote under the Equal Protection Clause of the Fourteenth Amendment. Docs. 55 and 61. Briefing was concluded Dec. 4, 1998. The Fifth Circuit panel heard oral argument June 1, 1999 and rendered its decision and judgment March 9, 2000.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND WITH PRIOR DECISIONS OF THE FIFTH CIRCUIT.

A. The *Shaw* Claims:

Petitioners have been denied their day in court to demonstrate the racial predominance in the construction of the Houston city council districts. Petitioners have made a powerful showing of unconstitutional racial districting that entitles them to a trial.

The Court below erred in not following *Hunt v. Cromartie*, 526 U.S. 541 (1999) (*citing Shaw v. Hunt*, 517 U.S. 899 (1996) and *Miller*) and returning the case for development of a full evidentiary record. "The legislature's motivation is itself a factual question." *Id.* at 549. "The task of assessing a jurisdiction's motivation, however, is not a simple matter; on the contrary, it is an inherently complex endeavor, one requiring the trial court to perform a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Id.* at 546 (citations omitted). This Court has on other occasions noted that intent is generally a matter for consideration by the trier of fact. *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982). *See also United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949) ("[f]indings as to the design, motive and intent with which men act" are peculiarly factual issues). While *Cromartie* involved a ruling for plaintiffs, and before the conclusion of discovery, the decision in essence calls for a full development of the evidence at a trial, which would allow for evaluating the demeanor of the witnesses and reviewing more than just a written legislative history.

The Fifth Circuit discounted Petitioners' view of *Cromartie*, that summary judgment is disfavored in *Shaw* cases. 206 F.3d at 506 ; App. at 6a-7a. The Fifth Circuit distinguished *Cromartie*, for there the nonmovant did not bear the burden of proof on the issue. *Id.*

Moreover, an application of the teachings of *Shaw v. Reno, Miller v. Johnson, Bush v. Vera*, 517 U.S. 952 (1996) and *Shaw v. Hunt*, suggests that these City of Houston districts, with this map and these demographic data, and with this legislative history, provide sufficient indications of racial gerrymander to justify a full trial. This includes evidence:

1. That race predominated over compactness.
2. That race predominated over contiguity.
3. That race predominated over the longstanding tradition of placing newly annexed territory in the most proximate district.
4. That race predominated over the tradition of having regionally based districts.
5. That race predominated over neighborhood reunification in the areas of Timbergrove Manor and Shepherd Forest.

The grant of summary judgment is reviewed *de novo*. *Campos v. City of Houston*, 113 F.3d 544 (5th Cir. 1997) (citing Armstrong v. City of Dallas, 997 F.2d 62 (5th Cir. 1993)). Evidence of the nonmovant is to be taken as true, and all reasonable inferences from that evidence as well. "[On] summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). The moving party is entitled to summary judgment only when a rational trier of fact, after considering the record as a whole, could not find for the non-

moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289 (1968)). A fact dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249.

Here the Petitioners had the burden:

> to show, either through circumstantial evidence of a district's shape or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations.

Miller v. Johnson, 515 U.S. 900, 916 (1995). Petitioners made just such a showing below.

The strong correlation of the district boundaries to race raises a fact issue. Dr. Weber in detail analyzed the race-based components of the present districts (Doc. 67, Attachment A [Second Suppl. Decl.], Ex. B) and the racial differences of the proposed reunifications not made. Doc. 83, Appendix A, Ex. 2. Separate precinct level maps by Hispanic ethnicity and black

race further show the close correlation between boundaries and race or ethnicity. Doc. 83, Appendix A, Ex. 1. The Hispanic population map shows the block by block carving and the close correlation of the western and eastern extremities of District H to ethnicity of the precincts, particularly marked in the "Bullwinkle" section to the east, carved from District B.

Moreover, this emphasis on race overcame traditional race-neutral principles, and thus the decision below conflicts with *Miller*:

Compactness. The absence of compactness is evident from a review of maps of the evolution of the 1997 plan. Doc. 29, Ex. 1, 28, 11, 27, 10, 26, 9, 25, 8; Doc. 83, Appendix A, Ex. 1. *See also Vera v. Richards*, 861 F. Supp. 1304, 1341 (S.D. Tex. 1994) (noting need to "[a]djust[] the sense of compactness to the complexity and population density of the urban landscape"). Dr. Weber noted that with respect to Districts B, E, H, and I that "[a]ll four districts have exceedingly irregular perimeter shapes (particularly along the internal boundaries of the districts)." Doc. 30, ¶ 30. District H is particularly notable because it is a purely internal district, sharing none of the exterior boundaries of the City.

Contiguity. In the 1997 City of Houston districting plan, "contiguity was honored only by cynical formalism." *Hays v. Louisiana*, 936 F. Supp. 360, 367 (W.D. La. 1996). The plan includes "a number of examples of technical contiguity where portions of districts are joined together by drainage channels or across virtually unpopulated land bridge areas." Doc. 30, ¶ 29; Doc. 67, Ex. G, responses to 43, 45, 48, 49, 51, 52, and 57. The race-based desire to join black Acres Homes residents in the northwest of the City to the rest of District B while maintaining the Hispanic percentages of District H caused a bending of the traditional districting principle of contiguity.

Doc. 30, p. 21. Similarly the far western appendage to District H, essentially uses point contiguity to join Hispanics living outside Loop 610 to those living inside. This bypassing of white residents is another example of race predominating over contiguity. Doc. 29, Ex. 19; Doc. 83, Appendix A, Exh. 1, Map of Hispanic Population Distribution by VTD[7]. Such point contiguity is evidence of an abandonment of traditional principles. *Shaw v. Reno*, 509 U.S. 630, 636 (1993) (noting that the offending district "remains contiguous only because it intersects at a single point with two other districts before crossing over them").

The Court in *Miller* approved a determination by the district court that shape, demographics and the "drawing of narrow land bridges to incorporate within the District outlying appendages containing nearly 80% of the district's total black population was a deliberate attempt to bring black populations into the district." 515 U.S., at 917. *See also Abrams v. Johnson*, 521 U.S. 74, at 111 (1997) (Breyer, J. dissenting) (noting "land-bridge linking Southern Atlanta with Savannah" of unconstitutional predecessor district). Here, a narrow land bridge connects the two populated portions of District B. The City specifically acknowledged its racial purpose in maintaining a similar land bridge in District E, which is still used as a connector in the current plan, in its 1995 Section 5 submission. Doc. 29, Ex. 32, p. 11 n.5. Neither the narrow corridor stretching across the top of the City to connect Acres Homes to the rest of District B, nor the tentacles of Districts H and I are necessitated by the irregular boundaries of the City. Doc. 29, Ex. 1; App. at 93a. The proper inquiry is "whether race predominated in the redistricters' actions in light of what they

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7 VTD is a Census Bureau term embracing precincts, wards, and other names for local polling districts where elections are conducted.

had to work with." *Bush v. Vera*, 517 U.S. 952, 971 (1996). Here the City had the internal lines to work with, and they worked with them racially.

Respect for communities. The City conceded that Timbergrove Manor Neighborhood Association, Shepherd Forest Civic Club, and Meadowbrook Civic Club were divided in the plan. Doc. 67, Ex. G, Responses to Requests for Admissions 30, 32, 35, and 56. The data clearly establish that the separated precincts in the Shepherd Forest area, in the extreme western appendage to District H, are racially divided by the challenged plan. The portion in mostly Hispanic District H is 46.8% Hispanic in voting age population, while the portion in mostly Anglo District A is only 4.7% Hispanic VAP. *Id.* at Response to Request for Admissions 34. Dr. Weber also presented circumstantial evidence of racial separation of neighborhoods by the plan, shown by an analysis of precincts which were marked for reunion, but could not be reunited when the City chose to continue to place them in separate districts. Doc. 83, Ex. 2. A fair inference to draw in favor of Petitioners from these data, at the summary judgment stage, is that race was more important to the City than neighborhood reunification.

The decision below also is contrary to the teachings of *Shaw v. Hunt*. Here the decision to avoid placing mostly Anglo Kingwood with the most proximate district, which is mostly black, was based on the erroneous view that the latter district could not be permitted to be reduced in percentage of African-American population according to retrogression principles.[8]

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8 Below, the City argued that the judgment should be upheld on the alternate basis that this contorted configuration was the only one possible consistent with avoiding retrogression. This position was not developed upon a full factual record below. *Richmond v. U. S.*, 422 U.S. 358 (1975),

Thus, the first major decision made about the plan was that Kingwood would not continue in District B. Doc. 67, Ex. C, pp. 98-105. Race was the criterion that, in the [City's] view, could not be compromised; [and other factors] came into play only after the race-based decision had been made." 517 U.S. 899, 907 (1996). *See* Doc. 67, Ex. D [Deposition of Council Member Roach], at 53-55 ("We don't do anything around here in terms of redistricting without talking about race."); Doc. 67, Ex. E [Deposition of Council Member Sanchez], at 31-32 (If

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should control the evaluation of retrogression after a substantial annexation.

"A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw v. Reno*, 509 U.S., at 655. The parties have a strong difference of views regarding what constitutes retrogression, and from what baseline it is to be measured. "Section 5 cannot be used to freeze in place the very aspects of a plan found unconstitutional." *Abrams v. Johnson*, 521 U.S. 74, 97 (1997). Petitioners take the view that Districts H and I are not properly subject to retrogression considerations. *See Chen*, 206 F.3d 502, 515 n.7; App. at 24a. With respect to District B, Petitioners' evidence shows regular success by black and Hispanic preferred candidates at levels as low as 20% and 15%, respectively, and even the district court below conceded the possibility "that the addition of Kingwood to District B would not have resulted in actual retrogression as to African-Americans in that district." 9 F. Supp. 2d, at 763; App at 90a. The City's professed concern that such a district would be "clearly" retrogressive was mistaken. Doc. 42, p. 17. Candidates preferred by black voters won every 1997 contest in a hypothetical district with Kingwood added to the closest portion of former District B, with the lowest victory being 55% of the vote. Doc. 67, Ex. A, pp. N-4 and N-8. Yet before the City adopted its plan, data was presented with analogous results in the November 1996 partisan elections for sheriff and judge. Each contest had involved a black candidate preferred by black voters, and each won with 60% support in a district made up of Kingwood and the adjacent portion of District B. *See* Doc. 29, Ex.13. Thus on this defense of avoiding retrogression a fact issue would preclude a grant of summary judgment.

Kingwood were wealthy blacks or the bulk of District B low-income whites, Kingwood would probably have been kept with District B).

Finally, a full trial or evidentiary hearing of some character would have permitted the district court below to give proper effect to the teaching of *Washington v. Davis*, 426 U.S. 229, 242 (1976) to consider the historical background of the City's decision, the sequence of events, departures from usual practice, and the like. Here, although in 1997 the City suggests incumbency protection and continuity support the effort to make minimal changes to the boundaries of each district, in 1991 the City had constructed a Plan #3 which sacrificed the incumbency of one of its members, Council Member Gorczynski, and radically reshaped District H. Like the failure to place Kingwood with the closest council district, this evidences a departure from usual practice, and illustrates the primacy of race.

B. The "One Citizen, One Vote" Claim

Petitioners urge this Court to make clear that in those rare cases where total population does not assure reasonably equal voter strength among the districts, a jurisdiction must use citizen voting age population as the basis for redistricting. *Garza v. County of Los Angeles Board of Supervisors*, 918 F.2d. 763, 778-788 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part). Alternately, Petitioners urge a more narrow claim, that in a setting where the differences in adult citizens between districts is extreme, a City violates the Fourteenth Amendment to purposely gather noncitizens into a few districts, not to compensate for this factor, and thus to exaggerate the voter inequality of its districts.

The differences in equality here are not like the minor differences approved by the Supreme Court in *Gaffney v. Cummings*, 412 U.S. 735 (1973). Here, the raw disparity in citizen adult population among the nine districts exceeds 30%. Doc. 68, Ex. G.

While this Court has not directly addressed the issue, voter equality among districts should be paramount to representational equality. The rationale for population equality of districts has traditionally been understood to provide fundamental equality of the political power of individual voters, wherever situated. Simply stated, an individual's right to vote . . . is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with citizens living in other parts of the State. . . ." *Reynolds v. Sims*, 377 U.S., at 568. *Accord, Hadley v. Junior College Dist.*, 397 U.S. 50, 56 (1970); *Lockport v. Citizens for Community Action*, 430 U.S. 259, 265 (1977) ("all citizens have an equal interest in representative democracy"). *Contra, Garza v. County of Los Angeles Board of Supervisors*, 756 F. Supp. 1298 (C.D. Cal.), *aff'd*, 918 F.2d 763 (9th Cir. 1990). *See also Daly v. Hunt*, 93 F.3d 1212, 1227 (4th Cir. 1996) (rejecting view that Constitution views electoral equality as more important than representational equality).

The decision below permitting use of either CVAP or total population data as the basis for redistricting also implicitly conflicts with the prior Fifth Circuit decision in *Campos v. City of Houston*, 113 F.3d 544 (5th Cir. 1997) holding that courts "must consider the citizen voting-age population of the group challenging the electoral practice when determining whether the minority group is sufficiently large and geographically compact to constitute a majority in a single member district" for purposes of Section 2 of the Voting Rights Act. *Id.*, at 548.

C. The Underpopulation of Minority Districts and Overpopulation of White ("Anglo") Districts Claim

In 1991 all minority districts for the City of Houston council were undersized. Three of the four minority districts are still undersized in relation to the ideal total population, both under the 1997 plan and after the minor 1999 adjustments. This undersizing was based on race, but with a view to compensating for an undercount of minority populations in the 1990 census. Minorities living in majority districts, however, were not adjusted by this process, and thus, even assuming a compelling interest, the use of race was not narrowly tailored to the purpose of compensating for the estimated undercount.

The intent to undersize the district of minority officeholders is shown in the minutes of a parallel City Council committee considering changes to the district structure. Reports of the meeting relate that Council Member Ben Reyes insisted that "minority districts" be undersized. "[I]f we erred on the side of the minorities, he couldn't imagine the court making us redo that." Doc. 68, Ex. I, p. 34.

Petitioners ask this Court to recognize that race-based government action in using the perceived permissible range for population deviation in a manner to ensure race-based outcomes is an analytically distinct violation of the Equal Protection Clause. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) ("all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny"). While such an action might survive strict scrutiny if it were narrowly tailored to achieve some sufficiently compelling interest, it is the City's burden to come forward with evidence of that interest, and to show that the use of race was narrowly tailored in this instance to achieve that asserted interest. A process of undersizing mostly black and Hispanic districts, but not adjusting for black

and Hispanic persons in all districts in which they may reside is not a narrowly tailored action.

Courts below have disagreed on the legal framework under which districts which deviate from the average in total population by less than 10 percent, but show a pattern of underpopulation of the minority districts, might violate the law. Two courts have recognized such practices to violate the Equal Protection Clause of the Fourteenth Amendment. *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996), remanded a claim to the district court for presentation of facts, if any, to support the position that arbitrary, or invidious action led to the population imbalance in local districts. The *Daly* court thus agreed that a person could state an Equal Protection claim, even within the 10% deviation which has come to be understood by some as *de minimis* and not permitting of further review. *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1032 (D. Md. 1994), also found that a cause of action for a pattern of underpopulation exists, and specifically mentioned one basis for such a claim could be racial discrimination. No violation was established on the facts of the case, however, as evidence failed to show an alleged policy to favor the City of Baltimore.

On the other hand, in *Sinkfield v. Bennett*, a state district court suggested that an racial underpopulation claim could only be brought as a type of white vote dilution claim under the Voting Rights Act, subject to proof of the preconditions of *Thornburg v. Gingles*, 478 U.S. 30 (1986). No. CV-93-689 (Montgomery Circuit Court, Nov. 20, 1997), *appeal dismissed as moot, sub nom. Rice v. Sinkfield*, 730 So.2d 993 (Ala. 1998). *See also Thompson v. Smith*, 52 F. Supp. 2d 1364, 1371 (M.D. Ala. 1999). The court found that "all eight (8) of the majority black Senate districts are underpopulated and six (6) are underpopulated by more than 4%. Of the twenty-seven (27) House districts, all but two are underpopulated." However, the

court found that the non-legislator proponent of the plan and the Speaker of the House were each unaware of these facts, and found no evidence of an intentional design to underpopulate majority black districts or overpopulate majority white districts.

II. COURTS OF APPEALS DISAGREE ON WHETHER LEGISLATIVE DISTRICTS MUST PROVIDE "ONE CITIZEN, ONE VOTE."

The Ninth Circuit has suggested that requiring use of adult citizenship figures to construct county commissioner districts in Los Angeles would deny equal protection to children and aliens within certain districts. *Garza v. County of Los Angeles*, 918 F.2d 763, 775 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991).

The Fifth Circuit below determined that the selection of a population basis for districting is a political question for the legislative body. 206 F.3d, at 527; App. at 48a (citing Burns v. Richardson, 384 U.S. 73, 92 (1966)). Commentators however have suggested that should any covered jurisdiction change to use citizen figures, the Department of Justice would likely deny preclearance under Section 5 of the Voting Rights Act, or private plaintiffs would sue under the Fourteenth Amendment. *See* Doc. 61, Ex. C, p. 794 n.59. The Fifth Circuit suggests the Fourth Circuit implicitly shares its view, and rejects the Ninth Circuit position. 206 F.3d, at 524; App. at 43a.

Judge Kozinski, dissenting in *Garza*, argued that the Constitution requires plans to gather equal numbers of voters into districts. 918 F.2d, at 785. The position of Petitioners is similar, that where citizenship varies wildly among neighborhoods of a jurisdiction, there is an obligation for the entity to create districts which more nearly approximate "one citizen, one vote."

III. THE QUESTIONS PRESENTED ARE IMPORTANT AND TIMELY.

Almost every political jurisdiction will adjust boundaries in 2001 as a result of new census figures, and the requirement to comply with the voting equality requirements of the Equal Protection Clause.

A. Guidance on Segregated Voting District Cases

The failure to even permit a trial on a map so distorted and with substantial evidence of race-based motivation illustrates that courts below are confused as to the parameters of race-based districting which will be allowed after *Shaw* and *Miller*. The Court should make clear that a serious, substantial Equal Protection claim against a contorted districting plan deserves a full evidentiary hearing.

Moreover, the Fifth Circuit decision below erodes the force of the teachings of *Hunt v. Cromartie* that these cases should come forward with a fully developed record and that the factual question of a legislature's intent should be evaluated by a sensitive inquiry. Here, the district court held no evidentiary hearing on the Motion for Preliminary Injunction, nor a trial. The decision below also creates an asymmetry in the law when read together with *Cromartie*. Summary judgment for political jurisdictions will be more common, but for injured voters more rare. Added to the government's advantages in crafting the formal legislative record[9], the ability to avoid discovery of contrary evidence by asserting legislative privilege, and the

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9 *See* Doc. 57, Ex. 2C [Transcript of City Council Meeting Dated April 9, 1997] at 48-49 (Council Member Castillo: "I think the debate so far has been very valuable in creating the record we need for supporting our plan").

unlimited financial resources to resist challenges, this asymmetry will result in further racial gerrymandering injustices.

B. Guidance on the Unequal Distribution of Noncitizens and Related Districting Decisions

The unequal distribution of potential voters across political districts, which results from the interaction of ethnic group-based districting and the stark differences in citizenship among ethnic groups, is profound. For example, adult citizens in the state senate districts of Texas vary from 257,396 for the Houston area District 6 (60.4% Hispanic in total population) to 414,818 for District 25 (81.9% Anglo in total population) in central Texas. Adult citizens in Texas state house districts range from 50,115 for the Brownsville area District 37 (89.5% Hispanic in total population) to 93,093 for District 108 (87.8% Anglo in total population) in north Dallas County.[10] *See also* J. E. Campbell, CHEAP SEATS (1996).

C. Guidance on the Practice of Underpopulating Minority Political Districts

As the *Sinkfield* state court case illustrates, the practice of underpopulating minority districts is not limited to Texas or to Houston. The Court should make clear that the use of race in this manner is subject to judicial review by strict scrutiny, and inappropriate where the race of an officeholder is used as a proxy for the race of undercounted citizens.

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10 Texas Legislative Council, PAR 502B reports for Plans H882 and S730.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 5, 2000

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 98-20440

U. S. COURT OF APPEALS
FILED
MAR 09 2000
CHARLES R. FULBRUGE III
CLERK

EDWARD CHEN, ET AL.,
Plaintiffs,

EDWARD CHEN; JON TAYLOR; EDWARD BLUM; BARBARA L. THOMAS; AL VERA; KENNETH M. POWERS; JAMES WHITE; HERSCHEL SMITH; BILL WIENER; BERNARD LOEBE; CHESTER WRYE; EDWARD ROBERT,
Plaintiffs-Appellants,

versus

CITY OF HOUSTON; BOB LANIER, Honorable; HELEN HUEY, Honorable; MICHAEL J. YARBROUGH, Honorable; MARTHA J. WONG, Honorable; JEW DON BONEY, Honorable; ROB TODD, Honorable; RAY F. DRISCOLL, Honorable; JOHN KELLEY, Honorable; FELIX FRAGA, Honorable; JOHN CASTILLO, Honorable; GRACIE GUZMAN SAENZ, Honorable; JOE ROACH, Honorable; ORLANDO SANCHEZ, Honorable; CHRIS BELL, Honorable; JUDSON W. ROBINSON, III, Honorable,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Texas
March 9, 2000

Before GARWOOD, DUHÉ and BENAVIDES, Circuit Judges.

GARWOOD, Circuit Judge:

Plaintiffs-appellants, residents of the City of Houston, filed this suit claiming that the City of Houston and the individual members of its City Council (collectively, the City) had violated the Fourteenth Amendment when they created the single member districts used to elect nine of the fifteen members of the Council. They claim that the City's 1997 redistricting violated the principle of one-person, one-vote, and that the districts created constituted a racial gerrymander impermissible under *Shaw v. Reno*, 113 S.Ct. 2816 (1993). The district court granted summary judgment for the City. We affirm.

Facts and Proceedings Below

The City is governed by a fifteen-member City Council, comprised of the Mayor, elected at large, five council members elected at-large, and nine council members selected through single-member districts (Districts A through I). The City is required to redistrict the single member districts every two years, and does so through ordinances. In the wake of the 1990 census, the City drafted a new districting plan. The Department of Justice refused preclearance, and the City responded by drafting an alternative plan that created two districts with weak majorities of Hispanic residents. This new plan received preclearance. Although due to a subsequently reversed district

court decision the new precleared plan was not used in the 1991 elections, *see Campos v. City of Houston*, 968 F.2d 446,452 (5th Cir. 1992), the form of that 1991 plan was substantially followed in the 1993 and 1995 redistrictings. Neither of these plans was challenged on *Shaw v. Reno* grounds, although the City did face litigation from plaintiffs claiming that the City was required to create additional districts with Hispanic majorities. *See Campos v. City of Houston*, 113 F.3d 544 (5th Cir. 1997) (affirming *Morris v. city of Houston*, 894 F. Supp. 1062 (S.D. Tex. 1995) granting summary judgment in favor of the City).

In December of 1996, the City of Houston annexed an area to the far northeast of the City known as Kingwood. Kingwood had a population of around 40,000, and some adjustment in the City's district boundaries for the 1997 scheduled redistricting was thus required to avoid unbalancing the population of the districts. The City drafted a plan placing Kingwood, and the surrounding area that had previously been a part of District B, into District E. Like prior City redistrictings, this was conducted in part by using a computer program that contained racial and ethnic data at the level of voting precincts. After a debate that included the plaintiffs' lawyer in this case, the Council adopted this plan by ordinance on April 9, 1997. The plan contained a maximum population deviation, when measured by total population, of 8.63%. Measured by total population, two of its districts had African-American majorities while two others had Hispanic majorities. It received preclearance from the Justice Department on July 7, 1997.

The plaintiffs launched this challenge to the 1997 districts on April 9, 1997--the same day the ordinance was adopted--claiming, among other things, that the districts constituted an impermissible racial gerrymander and violated the

principle of one-person, one-vote.[1] On August 15, 1997, the plaintiffs moved for a preliminary injunction. This motion was denied on October 3, 1997. On March 2, 1998, the City filed five separate motions for summary judgment. The district court granted all five motions and issued final judgment in favor of the City on May 7, 1998. *Chen v. City of Houston*, 9 F.Supp.2d 745 (S.D. Tex. 1998). This appeal, limited to the one-person, one-vote and racial gerrymander issues, followed.

Discussion

The plaintiffs maintain that the district court erred in granting summary judgment for the City. They argue that they produced enough circumstantial and direct evidence of the predominance of race in the City's districting decision to allow a reasonable jury to find in their favor. They also claim that the district court erred as a matter of law when it measured the City's compliance with the one-person, one-vote requirement using total population rather than figures that accurately reflected the distribution of potentially eligible voters in the City. Though the issue is extremely close and difficult, after careful review, we have concluded that the plaintiffs failed to meet their evidentiary burden on the *Shaw* claim and summary judgment was appropriate. We also hold that the use of total population to track the size of the districts does not, under these circumstances, violate the Equal Protection Clause.

I. Standard of Review

We review a motion for summary judgment by applying

1. Plaintiffs also contended that the plan violated constitutional requirements regarding ballot secrecy, the right to petition for redress of grievances, the right to freely assemble, and the right of political association. None of these claims is raised on appeal.

the same standard as that appropriate for the court below, and in doing so we interpret the evidence in the light most favorable to the nonmovant. Summary judgment is appropriate when the nonmovant fails to demonstrate that there is sufficient summary judgment evidence to allow a reasonable fact finder to find in its favor on all essential issues as to which it would bear the burden of proof at trial. *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 725 (5th Cir. 1995). However, this review must be understood in the context of the courts' traditional reluctance to interfere with the delicate and politically charged area of legislative redistricting. *See Reynolds v. Sims*, 84 S.Ct. 1362, 1394 (1964) ("legislative reapportionment is primarily a matter for legislative consideration and determination"); *Hunt v. Cromartie*, 119 S.Ct. 1545, 1552 (1999) (legislature has the benefit of presumption of good faith when it conducts districting). The Court has clearly indicated that this presumption may impact the assessment of the propriety of summary judgment in a suit challenging districts as racial gerrymanders. *See Miller v. Johnson*, 115 S.Ct. 2475, 2488 (1995) (sensitive nature of districting should be considered "when assessing under the Federal Rules of Civil Procedure the adequacy of a plaintiff's showing at the various stages of litigation and determining whether to permit discovery or trial to proceed").

In this *Shaw* challenge, the plaintiffs bear the burden of proving that race was the predominant factor in the City's districting decisions. *See Bush v. Vera*, 116 S.Ct. 1941, 1951 (1996). If the plaintiffs can demonstrate that race predominated so that "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines," the districts will be subject to strict scrutiny. *See Miller*, 115 S.Ct. at 2486. For a majority of the Supreme Court, the mere fact that race was given some consideration in the districting process, and even the fact that minority-majority districts were intentionally created, does not

alone suffice in all circumstances to trigger strict scrutiny. *See Shaw v. Hunt*, 116 S.Ct. 1894, 1900 (1996) ("Shaw II"); *Clark v. Calhoun County*, 88 F.3d 1393, 1404 n.2 (5th Cir. 1996) (identifying O'Connor, Rehnquist and *Bush* dissenters as supporting, with Kennedy reserving the question); *Theriot v. Parish of Jefferson*, 185 F.3d 477, 488 (5th Cir. 1999). And in the eyes of the author of *Shaw*, the plaintiffs' burden in establishing racial predominance is a heavy one:

> "To invoke strict scrutiny, a plaintiff must show that the State has relied on race in *substantial* disregard of customary and traditional districting practices.
>
> . . . .
>
> [A]pplication of the Court's standard helps achieve Shaw's basic objective of making *extreme instances* of gerrymandering subject to meaningful judicial review." *Miller*, 115 S.Ct. at 2497 (O'Connor, concurring) (emphasis added).

Plaintiffs nevertheless argue that summary judgment is disfavored in *Shaw* cases. They first argue that the question of the City's intent is inherently a fact-intensive inquiry that is unsuitable for summary judgment, relying on a recent Supreme Court reversal of a grant of summary judgment in a districting case. *See Cromartie*. This ignores, however, the fact that in *Cromartie* the district court had granted summary judgment for the plaintiff. The Court took care to stress that summary judgment was inappropriate not only because of the factual nature of the intent requirement, but also because the nonmovant did not bear the burden of proof on the issue. *See id.* at 1552 ("Summary judgment *in favor of the party with the burden of persuasion*, however, is inappropriate when the evidence is susceptible of different interpretations or inferences

by the trier of fact.") (emphasis added). The Court also relied on the traditional presumption that the legislature acted in good faith while districting. *Id.* Here, neither of these factors are present. The plaintiffs here bear the burden of persuasion, and the presumption of legislative integrity adds to, rather than lessens, their burden facing summary judgment.

The plaintiffs next argue that summary judgment is inappropriate because the case is one of mixed motives--while the City has proffered justifications for its actions grounded in traditional districting principles, it has also conceded that race was a factor in its decisions. The plaintiffs argue that the Court has indicated that a more searching inquiry is needed in such cases, and summary judgment is thus inappropriate. *Bush v. Vera*, 116 S.Ct. 1941, 1952 (1996) (in a mixed motive case a "careful review is, therefore, necessary to determine whether these districts are subject to strict scrutiny"). This position misconstrues *Bush*. The *Bush* court made this statement to distinguish mixed motives cases in which the districting body presented credible evidence of alternative justifications from those in which no valid traditional districting purpose was given and racial intent was obvious. *See id.* (distinguishing with *cf.* citation mixed motive case from *Miller*); *Miller*, 115 S.Ct. at 2485 (noting that district court had found evidence of predominance of race was overwhelming "and practically stipulated by the parties involved"). Far from indicating that summary judgment should be disfavored, the discussion the plaintiffs highlight demonstrates the gravity with which the court approaches facially valid defenses proffered by the legislature in the districting area. The City of Houston's presentation of valid evidence of nonracial intent, which transforms the case into one of mixed motives, advances rather than hinders its case for summary judgment. We will review the district court's grant of summary judgment using the traditional

criteria, and take into account both the presumption in favor of a legislature's good faith and a plaintiff's burden of proof.

II. Circumstantial Evidence of Racial Motivation-The Appearance of the Districts

A plaintiff may demonstrate that race predominated in a districting decision by introducing circumstantial evidence of the district's shape and demographics. *See Shaw II*, 116 S.Ct. at 1900 (1996). The shape alone of some districts may be so bizarre and irregular that their creation may only be interpreted as "an effort to segregate the races for purposes of voting, without regard for traditional districting principles." *Shaw*, 113 S.Ct. at 2824; *Cromartie*, at 1549 n.3 (some highly bizarre districts give rise to inference that race predominated more strongly than the inference that factors such as politics created the distortion). When shape alone is not determinative, plaintiffs may still prove their circumstantial case by demonstrating that the districts are sufficiently bizarre in relation to racial demographics and population densities. *See Miller*, 115 S.Ct. at 2489. The objective case against a district may also be affected by an analysis of whether the district adheres to traditional districting principles other than compactness, such as political considerations and fidelity to administrative boundaries. *See Bush*, 116 S.Ct. at 971.

In a very general sense, Houston's nine single member council districts can be described as being arranged like pieces of a pie, each district radiating out from the center to the edge of town. The two exceptions are District H, which does not touch the city's external borders due to a thin bridge between two halves of District B, and District E, which does not approach the city center. Were the City a congressional district carved out of the surrounding suburbs, its own shape would likely provide ample fodder for a *Shaw* claim. The City engulfs

independent incorporated areas, leaving two holes in its west half. It also includes three detached "islands" to the north of the City proper--two of them quite large--that are only tenuously connected to the "mainland" by narrow and unpopulated corridors. In addition, it includes several peninsulas jutting out into the countryside, the most outlandish of which extends in a snakelike fashion eastward out of District E between the IH-10 Freeway and the La Porte Highway. In short, as a glance at the map will readily confirm, the City has vastly irregular borders and does not even remotely approach a mathematical ideal of compactness.

But plaintiffs do not challenge the shape of the City of Houston, and the City is not in fact a congressional district. The City's highly irregular borders are simply a given that the Council was forced to deal with as best it could in crafting the districts challenged here. Because of the constraint imposed by the City's external borders, Houston's city council districts will never enjoy the pleasing symmetry of, say, Nebraska or Kansas (to say nothing of Colorado or Wyoming). The City's various peninsulas and protuberances, and in particular its archipelago of detached islands, have to be placed *somewhere*. While this might at first glance leave particular districts open to charges of being noncompact, these breaches of that ideal are unavoidable under the circumstances. Recognizing this, when drafting its guidelines for the redistricting, the city's geographic goal embraced functional as well as purely spacial compactness considerations.[2]

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2. Functional compactness is an inherently nebulous term drawn from a district court decision summarily affirmed by the Supreme Court. *See DeWitt v. Wilson*, 856 F.Supp. 1409 (E.D. Cal. 1994), *summarily aff'd*, 115 S.Ct. 2637 (1995). However, as Justice Kennedy had been at pains to highlight, summary affirmance is not an endorsement of a lower court's reasoning, *see Bush*, 116 S.Ct. at 1971 (Kennedy, concurring), and the concept as described in *DeWitt* seems to us open to abuse. However,

This rather obvious point seems to have escaped both the plaintiffs and their expert witnesses. The plaintiffs take care to lift segments of the City's districts and compare them to elements of *Shaw*, *Reno*, and *Miller*, but fail to point out this context. Thus, for example, the plaintiffs argue that the City's districting plan used narrow, unpopulated connectors to link District B with the Houston Airport area, and that District E has a snaking protuberance extending far to the east under the challenged plan. While this is surely correct, and leads to an immediate analogy to the *Shaw* district, it is absolutely irrelevant. Were Houston to purge race utterly from its districting process by handing over the task to a computer programmed to maximize purely spacial compactness, these deviations would still be present. The same error infected the expert opinion relied on by plaintiffs to demonstrate lack of compactness and bizarre shape. Plaintiffs' expert, Dr. Maggiotto, performed the type of mathematical analysis cited with approval in several cases and concluded that the City's districts were not compact.[3] However, Dr. Maggiotto failed to

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regardless of its merits when applied to an ordinary districting decision, functional compactness as applied here merely signals acceptance of reality. Contrary to plaintiffs' assertions, the fact that the City chose to use this term does not indicate that they had abandoned traditional districting principles.

3. The mathematical models generally used attempt to quantify departures from compactness by, for example, drawing a circle around the district's center or connecting the district's borders with an imaginary string. The district's deviation from this benchmark is then analyzed. Such techniques may or may not be probative when applied to areas in which external boundaries play a minor role. However, they certainly would need adjustment before being accepted when applied to a case such a Houston, or for that matter possibly Rhode Island. If not, the report will reflect massive deviations from compactness caused by factors beyond the legislature's control.

take into account that substantial deviation from absolute mathematical compactness was inherent in the City's current form. Accordingly, we reject his conclusion. Even on a motion for summary judgment, we are not required to take heed of an ill-reasoned expert opinion. *See Matsushita Electric Industrial Co. V. Zenith Radio Corp.*, 106 S.Ct. 1348, 1360 n.19 (1986).

This general failure of the plaintiffs does not, however, foreclose their case. They point to several districts which have borders that deviate from the Euclidean ideal in a manner not entirely traceable to the City's external borders. In particular, they highlight districts B, H, I, and E.[4] District B, which has an African-American majority, consists of one "island" around the Houston airport, and two distinct areas on the "mainland" that are divided by District H and are connected only by a thin strip of land along H's northern border. The eastern half of the District B plunges at one point into District I, and also has its pattern broken by the intrusion of an arm of District H. District H, while possessing a highly compact substantially rectangular core, has two "arms" extending to the west and southeast. The

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4. Plaintiffs also challenge districts C, D and A. District D is, on the whole, overwhelmingly compact and regular. While the district does taper sharply to the north before widening again near its apex, this feature hardly detracts from its overall cohesiveness. District C has regular borders with District D. Its irregularities occur in its borders with districts G and F. Like C itself, G and F are "white" "Anglo" districts (G is 79% "Anglo;" F is 41.74% "Anglo," 12.49% "Asian," 25.36% "Hispanic" and 4.68% "Black"); and the plaintiffs have never explained how these irregularities can be understood as a *racial* gerrymander--they have not shown that the areas affected had any special racial significance. On this record, all that the distortions in these districts show is that deviations from compactness may occur in racially innocuous contexts. Once the shape of the City is taken into account, deviations from compactness in District A arise only from the intrusion of an arm of District H, and thus the question of District A merges into the inquiry into District H's shape and demographics.

southeast arm curls around the borders of districts B and I in an ungainly fashion and terminates in a small, uneven projection extending a short distance back to the west, into District B. The far more regular western arm of District H extends for a fair distance into District A, and at one point tapers sharply to merely point continuity before expanding again. District I by comparison is far more compact, although its eastern and western sections are separated to a certain extent by District B. District E consists of a southeastern portion that would be fairly compact but for the City's borders. However, it also includes the large island in the Lake Houston area to the extreme northeast of the city, with which it shares a connection only by a narrow eight-mile corridor. The nature of this connection cannot be helped, as it is a product of the City borders. As the plaintiffs stress, however, the Lake Houston island is closer as the crow flies to Districts B and I than to the balance of District E. In previous plans, the portion of this island then within the City was in fact placed in District B.

Certainly, these four districts--B, H, I and E--are not perfectly compact. And since District B is a predominantly African-American district, Districts H and I contain Hispanic majorities, and District E is mainly white or "Anglo," the shape of these districts is not so regular as to preclude the plaintiffs from showing that race predominated in the drawing of a portion of some of the extremities of these districts. But these districts are not the type of sprawling monstrosities that have previously been found to violate *Shaw* by the Supreme Court. Indeed, *Bush v. Vera* discussed districts that substantially overlapped with the contested districts H, I and B. A quick review of the map in *Bush* will demonstrate that the City was far more faithful to the ideal of compactness than the Texas Legislature was in drafting the *Bush* plan. In *Bush*, legislators attempting to create Houston area seats for both Blacks and Hispanics effected this goal by selecting block-sized packets of

Hispanic or African-American voters and linking them each into their respective district. The end result created two of the three least regular districts in the country, comparable to a jigsaw puzzle in which the pieces could not be removed. *See Bush*, 116 S.Ct. at 1958. In *Bush*, in the area at issue here, an already somewhat ungainly tentacle of the African-American district contained uneven veins of loosely interconnected Hispanic blocks that were placed in, and attached tenuously to, the Hispanic district. Not only does the City's districting of the same area fail to even approach that level of non-compactness, the record indicates that the Council specifically rejected a proposal by one of its members to redraw its districts to mimic the plan rejected in *Bush* on the grounds of noncompactness. In addition, we note that the City successfully resisted pressure from private litigants to draft a plan containing four majority-minority districts--something that almost certainly would have created a more bizarre plan. *See Campos*, 113 F.3d 544. Race was clearly not the only factor driving the City's districting, because it avoided these extremes.

While we certainly do *not* mean to suggest that the extremes of *Bush* or *Shaw* are the minimum threshold for a successful suit, we simply cannot find that the challenged shape of the districts here offers adequate evidence that race predominated in the districting. This is especially true since some of the specific departures from compactness that the plaintiffs highlight are not as dramatic as they might initially appear. First, the plaintiffs attempt to paint the odd southeastern arm of District H as an attempt to maximize Hispanic numbers in H while avoiding the inclusion of African-Americans. But this argument ignores the fact that District H's arm borders not only "Black" District B, but also District I--the other majority Hispanic district in Houston. Had the City's sole real concern been maintaining the racial purity of these districts, that goal could have facially just as easily been accomplished by placing

H's southeastern arm in District I, in exchange for the placement of District I's northwestern corner in District H. This configuration would have appeared far more compact and regular, since the arm of H blends naturally into the north of I. And since the relevant borders of the arm itself would not have altered, the African-American population of B would have been unaltered and the percentage of Hispanics in both H and I would have remained roughly equivalent. Careful demographic analysis of the populations in these disputed areas might disprove this hypothesis, but the plaintiffs failed to even attempt to provide such data. The evidence does not tie the particularly unusual feature of H's borders to race to the exclusion of any other real concerns.

Second, the usage of a narrow connector to link the two sections of District B separated by District H is also not as facially objectionable as it first appears. The plaintiffs argue that District B's odd shape is explained by the City's desire to carve out a Hispanic majority for District H, and continuity in B was accordingly sacrificed, with the narrow connector a mere token concession to the principle. However, when the area of District B as a whole, including the dead space not included in the City, is taken into account, this picture is far from clear. Because a large section of District B is a detached island, B is in some respects missing its center. The geographical heart of the district is located outside the City limits. The northern island of B and its two mainland halves would constitute a facially unobjectionable compact body if the intervening unincorporated territory were included. If one takes this into account, and views District B as an attempt to reflect a coherent geographical neighborhood in the north of the City that happens to be broken up by unincorporated dead space, the outline of the district becomes much less offensive. Rather than being a racial subterfuge, the strip of territory connecting the incorporated halves of B can be properly seen as marking the central border

of a coherent and relatively compact district whose outline is only clouded by the City's irregular borders.

Lastly, the presence of the detached Lake Houston area in District E offers less support for the plaintiff than it otherwise might. Concededly, the placement of this area leads to the creation of an ungainly district that sprawls from the northern to the southern extremity of the City. And this northeastern island is closer to District B, so it would seem to do violence to the compactness concept to put it anywhere else. However, this must be placed in the context of the City's most unusual outline. When a districting body has the opportunity to create truly compact districts and chooses not to, the harm is obvious. But when, as here, spacial compactness is simply impossible, further departure from the principle seems less jarring. Wherever the island was placed, its representative would have to travel several miles outside of the City proper, and voters in that district would have had the odd sensation of being thrown together with an area with which they shared only a technical connection. Given that the City's design had already decisively severed the island from its neighbor, its placement in a district that was a few miles farther away seems less offensive than it would otherwise. A judicial analogy may serve to clarify this point. We would find it odd indeed if Congress decided to place Washington State within the realm of this Circuit when the opportunity to keep it within the Ninth Circuit was present. But it is far less troublesome that Puerto Rico has been assigned to the First Circuit rather than the Eleventh (or the Fourth). The placement of Kingwood and its environs is discussed in more detail below, but facially we find that its separation mitigates to a large extent the effect of its placement in District E.

In short, when viewed properly, the geographic boundaries here do not in and of themselves make out a strong circumstantial case under *Shaw*. That does not end our inquiry,

however. As *Miller* indicated, a district that is not facially outrageous may be objectively revealed as a gerrymander by linking its shape to demographics and other factors. In *Miller*, the Court conceded that the district's shape, while hardly perfect, was not sufficient standing alone to lead to the conclusion that it was bizarre in a *Shaw* sense. It then turned to a closer analysis of the geography in light of the district's demographics. It noted that the district's shape became far more troublesome once it was recognized that the core of the district was relatively unpopulated, while the carefully drawn exterior borders reached out to engulf urban African-American population centers. Viewed in light of this evidence, a shape that initially merely raised eyebrows was revealed to present overwhelming circumstantial evidence of a constitutional violation. *See Miller*, 115 S.Ct. at 2489 ("Although by comparison with other districts the geometric shape of the Eleventh District may not seem bizarre on its face, when its shape is considered in conjunction with its racial and population densities, the story of racial gerrymandering seen by the District Court becomes much clearer.").

Here, as in *Miller*, we are presented with districts in which deviations from the compactness ideal are present but are not overwhelming. But unlike in *Miller*, the plaintiffs have failed to present us with specific demographic data that would clarify the racial nature of these distortions. The plaintiff's expert, Dr. Weber, merely produced demographic data covering the districts as a whole. He did not give us a demographic analysis of the specific features--the arms of H, the connector section in B, and the northeast island in E--that are at issue in this case. His report did not show that, for example, the arms of District H contain most of the district's population, and H's compact core is relatively unpopulated. Nor was there even data demonstrating that the western arm of H is designed to capture a specific pocket of Hispanics in order to maintain Hispanic

supremacy in the district. Based on a map of Hispanic population dispersion in the record, it appears this arm includes several areas without, and excludes some areas with, high ratios of Hispanics. The general, over-broad data Dr. Weber used supports only his conclusion that these districts could be made more heterogenous. And this is hardly relevant--of course if one solely focused on increasing racial heterogeneity one could improve this factor, just as one could increase homogeneity by adopting the pattern rejected in *Bush*. But districters are not bound--or allowed--to sacrifice traditional districting concerns to meeting quotas of diversity, just as they are not allowed to do so in order to meet quotas of racial concentration.

Plaintiffs also argue that the fact that the number of racially homogenous precincts increased in the 1997 plan demonstrates that the City's districting was predominantly linked to race. Standing alone, however, this fact does nothing to support the plaintiffs' case. For reasons of their own, populations occasionally shift within urban areas. If members of one racial group chose to move out of certain areas, the numbers of racially homogenous precincts would increase. However, this phenomenon would not be tied to the actions of the districting parties-they could keep the borders of the districts static and the same effect would be seen. Indeed, according to the plaintiffs' version of events this is precisely what occurred--they criticize the 1997 plan for substantially maintaining prior boundaries. Without tying this evidence to specific choices by the City, and in particular to the discrete noncompact elements of the plan that they challenge, this evidence fails to aid the plaintiffs' case. Ultimately, the plaintiffs failed to demonstrate by use of demographics, as was done in *Miller*, that the specific departures from compactness that it challenges are the product of race rather than other factors.

However, compactness is not the only traditional

districting principle. Other factors, such as the protection of political incumbents, the maintenance of administrative units, and the reflection of communities of interest, play a part in the districting process. By showing that the design of a district violates these other traditional districting principles, the plaintiffs support their circumstantial case.[5] The districts clearly adhered to at least one traditional districting principle by maintaining the integrity of the relevant administrative unit, voting precincts (although as discussed below plaintiffs argue that these units are themselves tainted). However, the plaintiffs argue that the districts do not serve the traditional districting principle of reflecting communities of interest. In the more egregious examples of gerrymandering, the violation of this traditional principle will be facially obvious. Thus the district challenged in *Shaw* could be safely assumed not to have been driven by communities of interest, since it "winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas" in an attempt to gather up "enclaves of black neighborhoods"and "even towns are divided." *Shaw*, 113 S.Ct. at 2821.

But when presented with closer questions, the Court has focused on the specific features of a district that cause it to depart from compactness in assessing whether they are unjustifiable on traditional grounds. Thus in *Bush*, where the State attempted to justify its decision-making on the analogous traditional ground of partisan politics--and there was indeed a correlation with politics when the districts were looked at as a whole--the Court found it significant that "the maps reveal that political considerations were subordinated to racial classification in the drawing of many of the most extreme and bizarre district

5. City council elections are at least formally nonpartisan. Perhaps because of this, neither party stresses the traditional districting principles of general, jurisdiction-wide political gerrymandering.

lines." *Bush*, 116 S.Ct. at 1957. The fact that the State was willing, in the course of extending a noncompact tentacle engulfing a pocket of African-American voters, to include a large number of Republican voter tabulation districts in a congressional district ostensibly designed to maximize Democratic power was clear evidence of the subordination of politics to race. *Id.* And in *Miller*, the demographic data was heavily reinforced by an analysis of how specific choices violated communities of interest. Because the challenged district reached out to include African-American pockets in several entirely separate urban communities, and linked them together with a sparsely populated and wholly rural core, the "social, political and economic makeup of the Eleventh District tells a tale of disparity, not community." *Miller*, 115 S.Ct. at 2484.

Here, the plaintiffs have failed to link the specific departures from compactness that they highlight to the violation of traditional districting principles. They first claim that several neighborhoods were split in the 1997 plan. But the City introduced evidence that more neighborhoods were reunited than were split by the plan, and the plaintiffs have not challenged this assertion. Moreover, the plaintiffs failed to show where the allegedly split neighborhoods were. While it may be unfortunate that a predominantly white neighborhood was split between two white districts, the existence of such a districting *faux pas* may well have nothing to do with the racial issues that concern us here. The plaintiffs' evidence of neighborhood splitting is not helpful to their case.

Plaintiffs also tendered the opinion of Dr. Maggiotto, who analyzed various purportedly relevant statistical indicators of communities of interest.[6] His report claims that, in the City

6. We note some unease with the categories deployed in the study. Here, we are particularly troubled by Dr. Maggiotto's reliance on the category of

as a whole, race varies less within the districts than do his chosen indices of community. This evidence, it is argued, demonstrates that race predominated in the City's districting. However, the plaintiffs again use too blunt a statistical tool. Socio-economic variation within districts is almost unavoidable, particularly when, as here, the constituent districting units are fairly large--approaching 200,000 persons. Not many, if any, rectangles of this size randomly deposited on a map of Houston could be expected to capture an essentially homogenous socio-economic group. At least when relatively large districts are involved, the mere existence of socio-economic variations within the district is not probative. To provide valid circumstantial evidence of the predominance of race in the City's districting, then, Dr. Maggiotto had to tie his data to specific districting decisions, or the plaintiffs had to place his data in context by showing that the variations from available normal compactness were likely caused by racial factors. This they failed to do. They did not show--or even claim--that, for example, the southeastern arm of District H extends outward to reach a pocket of wealthy Hispanics who share nothing other than race with the bulk of the district, the way that the Atlanta extremity of the *Miller* district shared no commonality with the district's rural core other than race. Nor did they show that the western arm of H is designed to reach a pocket of Hispanics at the cost of including on the way neighborhoods that share

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"industry of employment." To expect that any large district will be characterized by a single, or a few, industries of employment is problematic, since we have generally left behind the era of mill town and mining towns. And a mailroom clerk in a bank will not necessarily enjoy a community of interest with its lending officers. An area such as Silicon Valley may be an exception to this, and the category may be highly relevant when analyzing congressional districts to quantify urban and rural areas. *See Miller*, 115 S.Ct. at 2484, 2490. But applied to Houston, this seems a remarkably unprobative tool. We note this only in passing, since Dr. Maggiotto's report is not on point in any event.

nothing with the rest of that district, the way that Texas reached out to a pocket of African-Americans at the cost of including Republican districts in *Bush*. Indeed, the plaintiffs never analyzed or even referred to the socio-economic composition of the specific areas created by the City's departure from geographical compactness, relying instead on broad statistics covering the entire area. *See Bush*, 116 S.Ct. at 1957 n.* (criticizing dissent for relying on statistics showing political orientation for district as a whole, rather than concentrating on border segments). Had they done so, perhaps our decision today might have been different. But bearing in mind that it was the plaintiffs' burden to produce evidence that race predominated, and also remembering the presumption in favor of legislative integrity, we cannot say that the shape and demographics of the districts here provided adequate circumstantial evidence of the predominance of race to prevent summary judgment.

III. Direct Evidence

Plaintiffs also argue that they have sufficient direct evidence that the City's districting was predominantly driven by race. They focus on two major points. First, they argue that the major decision made during the 1997 districting-that the newly annexed area of Kingwood should be placed in District E rather than District B--was predominantly influenced by race. Second, they argue that the 1997 plan substantially maintained the borders of previous plans, and that those borders were set by a process in which race--specifically, the desire to create two black and two Hispanic single member districts--predominated. The City concedes, as it must, that race--in the form of a desire to comply with the Voting Rights Act--was a factor in all the plans. But as we have stated before, a majority of the Supreme Court does not believe that the mere presence of race in the mix of decision making factors, and even the desire to craft majority-minority districts, does not alone automatically trigger

strict scrutiny. *See Clark*, 88 F.3d at 1404 n.2; *Theriot*, 185 F.3d at 488.

Before touching on plaintiffs' most heavily pressed intent evidence, we briefly dispense with their argument that racial intent can be inferred from the City's use of precinct lines. Plaintiffs assail the district lines because they hew to precinct lines. Conformity to such administrative boundaries is ordinarily seen as a virtue, not a vice, in the districting process. *See Bush*, 116 S.Ct. at 1953 (noting maintenance of some county lines showed traditional factors were not entirely ignored). And plaintiffs have not identified--and there does not appear to be--a larger, more race-neutral, administrative unit that could have been practically deployed. *Cf. Miller*, 115 S.Ct. at 2490 (noting that plan split several counties, and thus violated traditional districting principles-use of precincts could not mitigate this fact in congressional districting). But the plaintiffs stress that the City had access to racial data on the precinct level. They attempt to analogize this situation to *Bush*, where the State used a computer system that had racial data available on the block level. The fact that the plan ultimately adopted split precincts and used block units instead was found to offer compelling proof that race has predominated in the districting. But the key factor in *Bush* was not the mere availability of racial data. Rather, it was the abandonment of a traditional districting unit, the precinct. Since this step violated traditional districting principles and caused substantial administrative problems, and since given the fact the only additional precision the computer provided at the block level was racial, the obvious inference was that race drove the decision. *See Bush*, 116 S.Ct. at 1959. Here, in contrast, the City adhered to the traditional--and apparently the only--administrative boundaries readily available. The plaintiffs complain that this is irrelevant, since the size of the precincts was deliberately shrunk to allow more precise racial gerrymandering. However, the City of Houston does not set

precinct size, and the plaintiffs have not tied the changes in precinct sizes to any actions of the City.

A. Kingwood

The major change made by the City in 1997 was driven by the City's decision to annex Kingwood, an overwhelmingly white (Anglo) planned community with a population of around 40,000 people that is attached to the detached Lake Houston area. The decision to annex Kingwood is itself not before this Court. Rather, the plaintiffs complain that Kingwood--and with it the rest of the northeastern island around Lake Houston-- was placed in District E. Previously, this island had been attached to District B. They claim that they have direct evidence that race predominated in this decision--specifically, that the City's overwhelming motivation in doing so was avoidance of potential section 5 retrogression liability. Because Kingwood has a large population, and because District B was close to the one-person, one-vote population limit, placing Kingwood in B would have forced the City to move areas on the borders of B into the surrounding districts. And because the only district adjacent to B with a white (Anglo) majority--A--was already relatively overpopulated, moving areas from B to A would have in turn created more spillover effects, resulting in the disruptive necessity of redrawing several districts. Placement of spillover from B into Districts H or I would initially seem more attractive, since those districts were underpopulated. However, the addition of African-American voters displaced from B would seemingly have eliminated the Hispanic majorities in either or both of these districts. The City believed that this might have triggered retrogression concerns under section 5 of the Voting Rights Act.[7] Placement in District E, by

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7. Although we do not reach the question of strict scrutiny, we note that there is evidence in the record indicating that Hispanics do not constitute

comparison, allowed for the smooth integration of Kingwood. Spillover and one-person, one-vote concerns were minimized, with only relatively minor border changes made necessary.

The evidence clearly indicates that the City's decision to place Kingwood in District E was partially driven by the fear of retrogression. Its section 5 filings and the statements of both the drafter of the plan and the council members involved establishes this, and the City does not contest it. Indeed, it argues that this concern would allow it to survive strict scrutiny review. And to a certain extent--as discussed above, the issue is not as pressing when a detached island is concerned--compactness was sacrificed in the placement of Kingwood. Kingwood is closer to District B than it is to District E. However, a review of the record indicates that the Council had before it at the time it made its decision to place Kingwood in District E two other legitimate grounds for justifying its decision. First, the City wanted to preserve communities of interest. Second, it wanted to minimize disruption in the run-up to the expected major redrawing of districts following the 2000 census. On this record, we cannot say that there has been an adequate showing that race predominated over these concerns.

The most powerful alternative justification for the City's actions is the nature of Kingwood and it greater community of interest overlap with portions of District E. The Court has noted that concern about communities of interest is a valid traditional

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a majority of the citizen voting age population in either of the two nominally Hispanic districts. Citizen voting age population is the proper measure under section 2 of the Voting Rights Act. *See Campos*, 113 F.3d at 548. Conceptual difficulties are presented in evaluating retrogression under section 5 when no minority-majority districts are present to act as a baseline. *See Reno v. Bossier Parish School Board*, 117 S.Ct., 1491, 1503-04 (1996) (Thomas, concurring).

districting tool that may serve to deflect an inference that race predominated in districting. *See Bush*, 116 S.Ct. at 1954 (evidence that "district lines were drawn in part on the basis of evidence (other than racial data) of where communities of interest existed might weaken a plaintiff's claim that race predominated in the drawing of district lines."). Here, transcripts of the series of council debates that led to the final vote on the districting plan demonstrate that members of the Council discussed and evaluated data that indicated that Kingwood's communities of interest overlapped with District E, but were wildly at variance with District B. The fact that this material was available to the Council at the time they were deliberating on it serves to distinguish this case from others in which alternative justifications have been raised after the fact and only hypothetically motivated the districting body. *See Shaw II*, 116 S.Ct. at 1902 n.4 (purported justification must be actual purpose in adopting plan and supported in the evidence); *Bush*, 116 S.Ct. at 1955 (disregarding community of interest justification because data was not before the legislature in an organized fashion).

In the Council debates, members of the Council referred to both anecdotal and statistical evidence demonstrating that the average income and quality of housing in Kingwood were much higher that those found in District B, while the percentage of persons on public relief and the occurrence of illiteracy was much smaller. Moreover, the members of the Council did not limit themselves to general discussions of socioeconomic indicators. They pointed to specific factors that demonstrated that District B's community concerns varied from those in Kingwood. Because Kingwood is a planned community, it has excellent infrastructure. In comparison, the infrastructure in District B was referred to as among the worst in the City. This would raise the concern that the residents of Kingwood's desire and need for municipal improvements would diverge from those

of other residents of District B. It was also stated that Kingwood had privatized several municipal services, and paid for services using regressive user fees rather than more progressive property taxation. This difference would obviously lead to a divergence between the two areas' approaches to services and taxation.[8] In comparison, District E was said to be far more congruent with Kingwood than District B. Its infrastructure and average income were much closer to Kingwood's. It also contained planned communities that shared Kingwood's special concerns regarding services and taxation. In light of the greater similarity between the two areas, in the eyes of the members voting for the plan it made sense to place Kingwood in District E.

Significantly, opponents of the plan--and two Council members, as well as the plaintiffs' lawyer in this case, spoke out in some depth against it before the vote--never challenged these assumptions. At no point were the Council members' characterization of Kingwood's socio-economic status, infrastructure, and services called into question in any way. The closest an opponent of the plan came to undermining the majority's community of interest assumptions was a discourse by one of the members who voted against the plan. He argued that communities of interest were inherently linked to geography, and thus could not bind Kingwood to District E. In its strong form, this statement would make communities of interest a mere subset of geographic compactness. In its weak form, it is generally correct and a useful observation to guard against abuses of the community of interest rationale. Here,

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8. We note that although this discussion was couched in terms of communities of interest, and the City chooses to defend it as such, there are significant overtones of political as well as community justification in the debates.

however, this reasoning is inapplicable. Since Kingwood was separated from the main body of both Districts B and E, it was never likely to share a sense of geographic neighborliness with either district. The question was not one of placing Kingwood in either District E or an adjacent community linked in the eyes of the populace with Kingwood. Instead, the issue was which of two geographically isolated areas Kingwood and its surrounds should be shoehorned into-a district in which it had nothing in common or one with which it shared at least some points of community concern.

Nor have the plaintiffs pointed on their appeal to any evidence that undermines the community of interest justification. As noted above, their arguments and evidence regarding communities of interest are fatally flawed by the broad level of generality they adopt. Here, this weakness is especially glaring. Plaintiffs have not presented data about Kingwood at all, let alone introduced evidence that undermines the arguments made by proponents of the plan at the time. Since Dr. Maggiotto did not separate out Kingwood, his data cannot be used to undermine the City's justification here--there is no evidence that factors such as occupations or educational level create a significant point of commonality between Kingwood and District B that mitigates the divide created by raw income and other factors. Indeed, Dr. Maggiotto's evidence largely confirms the City's analysis. It shows that District B was the second poorest district in the City, while District E was the second richest, and contains the lowest variation of income. At most, plaintiffs have shown that all of District E is not exactly congruent with Kingwood. They have not shown, and have never claimed, that Kingwood was more similar in regard to the factors discussed to District B than it was to District E. And they never attempted to introduce, by expert opinion or otherwise, evidence tending to show that this lack of similarity was overcome by the presence of commonalities in

nonquantifiable indicia of communities of interest.[9] In short, this is not a case where a decision is justified by a "mere recitation of purported communities of interest" unproven by facts in the record. *Cf. Miller*, 115 S.Ct. at 2490.

Further support for the City's position is provided by the special nature of the decision of where to place Kingwood. Not only was the council presented with the awkward task of placing a disconnected, newly-acquired parcel of land into a settled districting scheme, it also did so against the looming background of the upcoming census. As a result of the 2000 census, the City will in the near future receive significantly better data about its population. A report prepared for the Council by a local university professor, Dr. Alford, indicated that the City would be required to engage in a major overhaul of its districts in light of this data, and that a similar effort in 1997 based on soon-to-be obsolete census figures would be inefficient. The City evidently has followed a practice of confining major changes to the districting that follows the census. *See Campos v. City of Houston*, 968 F.2d 446, 449 (5th Cir. 1992) (discussing replacement of old plan "used during the 1980s" in wake of 1990 census). In light of this, it is hardly surprising that the City would be reluctant to place Kingwood in an area which would require major alterations of the district plan. Several Council members spoke to this effect. By placing Kingwood in District E, the City minimized the spillover effect mandated by one-person, one-vote concerns, and the corresponding mass redrawing of districts that would ensue. Under the special--if not wholly unique--situation created here

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9. Had there been meaningful evidence to that effect it might well have been difficult to refute for summary judgment purposes. Because of the inherently subjective nature of the concept, it would seem that reasonable people might disagree as to what constitutes a community. We thus caution against general over-reliance on the communities of interest factor.

by a major annexation located so soon before the next census, this would seem a valid concern.[10]

The plaintiffs attempt to undermine this evidence by arguing, in essence, that the Council's debates were mere smoke and mirrors concocted in anticipation of precisely this lawsuit. Certainly, the debates evidence an intense awareness of the possibility that the districting would be subject to a *Shaw* suit. The first day of the debate began with legal counsel explaining the nuances of *Miller* and *Bush* in great detail to the Council. However, this record does not support a conclusion that the whole debate was essentially scripted. The voluminous testimony exhibits meaningful disputation, and several proponents of the plan used language and took positions that are not consistent at all with the hypothesis that the supporters of the plan were carefully coached. Given the presumption in favor of legislative good faith granted in this area, we cannot say on this record that the mere fact that the Council was aware of the meaningful possibility of this litigation suffices to create a fact issue as to their statements being mere pretexts for concealed racial motivation. We cannot say that a fact issue has been created regarding the predominance of race in the placement of Kingwood. The decision was independently

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10. We note that this conclusion was strongly reinforced in the eyes of several Council members by the plaintiffs' failure to draft an alternative plan. While the drawing of a flawless alternative is not necessary to mount a *Shaw* suit, and we recognize the difficulties private litigants may have in doing so, it would certainly have helped under the circumstances. Faced with a choice between a comprehensive plan that was supported by several independent justifications and the plaintiffs' response--a map of the City showing Kingwood and its environs in District B, with no indication of the boundary shifts that would follow--it would not be surprising if the Council members imagined a worst-case scenario in regards to disruption (or the possible effects on their own district).

justified by several factors besides race at the time it was adopted, and the force of the traditional concern that was sacrificed--compactness--was diminished by the context of placement of a detached island.

B. Continuation of a racially motivated districting structure

Plaintiffs also contend that the City violated *Shaw* by failing to make substantial changes in a districting structure that was originally designed in a manner that race predominated over traditional districting concerns. The sins of past Councils, and the Department of Justice (DOJ), thus are claimed to haunt the current Council's asserted ratification of their work. The district court summarily rejected this argument, reasoning that the constitutionality of the prior plans had never been challenged, and the intent behind their creation was thus not properly before the court. This would appear to have been overly hasty. In the context of Voting Rights Act suits, evidence that impermissible racial intent had tainted the plan upon which the challenged plan was based has been allowed, even when enough time has elapsed for a substantial degree of familiarity and political reliance to emerge. *See Garza v. County of Los Angeles*, 918 F.2d 763, 768-69 (9th Cir. 1990), *cert denied* 111 S.Ct. 681 (1991). The mere passage of time cannot extinguish entirely the taint of racial discrimination. *See Hunter v. Underwood*, 105 S.Ct. 1916 (1985) (discriminatory intent behind 1901 disenfranchisement provision coupled with continued discriminatory impact relied on to invalidate statute). And in a context like the one before us, where the City redistricts relatively frequently, adoption of the City's position would seem problematic because it would give potential challengers an incentive to launch more frequent lawsuits. If the potential plaintiffs did not sue, they might find that the passage of other plans had sanitized the intent embodied in the prior plan.

We first note that while race clearly played an important role in the earlier districting efforts, the quality of evidence introduced by the plaintiffs in regard to the earlier efforts (as well as respecting the 1997 ordinance) falls far short of that introduced in the cases examined by the Supreme Court. As discussed above, the objective, circumstantial evidence of the predominance of race is far weaker than in those cases. As for direct evidence, in the *Shaw* cases not only was the end product of DOJ intervention a monstrosity that massively violated traditional districting principles, but the State also openly stated in its section 5 filings that race was its dominant concern rather than just a factor. See *Shaw II*, 116 S.Ct. 1901 (preclearance submission announced creation of minority districts was State's "overriding purpose"). A similar direct admission of intent was present in *Bush*. *See Bush*, 116 S.Ct. at 1957 (testimony of state officials in related litigation claimed that race was the primary consideration in districting). And in *Miller*, where--as here--the district's shape was not itself extremely bizarre, the evidence that race trumped other concerns was conclusive. There, the DOJ rejected proposed plans not once, but twice, and ultimately made it clear to the State that it would only accept a result that mirrored a plan proposed by a third party, the ACLU. Ultimately a plan designed around this framework was adopted, as legislators who voted in its favor testified,[11] simply because the State felt it had no other choice. Obviously, the ACLU lawyer who drew up the outlines of the plan challenged in

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11. Here, in contrast, the plaintiffs have introduced the affidavits of two members of the Council who were *opposed* to the plan. The affidavits do not purport to relate incriminating conversations or statements made by proponents of the plan that would serve to demonstrate the majority's intent--they merely state the dissident Council Members' personal opinions. And their opinion that race predominated, while no doubt deeply held, cannot demonstrate the impermissible intent of the majority.

Miller could have no firm understanding of, or respect for, the subtleties of traditional districting. *See Abrams*, 117 S.Ct. at 1933 (State "adopted the Justice Department's entirely race-focused approach to redistricting"); *Johnson v. Miller*, 864 F.Supp. 1354, 1368 (S.D. Ga. 1994) (lower court discusses role of ACLU drafter). The inference was thus automatic that race had not only predominated over, but had indeed almost entirely extinguished, traditional districting concerns.

Here, in contrast, the only evidence that the plaintiffs produced is the raw history of DOJ intervention, which contains no brazen admission that race predominated and no details regarding a pattern of DOJ pressure.[12] Plaintiffs relied on the fact that in 1991 the City's original plan was denied preclearance, and that while the plan the City drafted in response creating additional concentrations of minorities was never implemented, it formed the template for the 1993, 1995, and 1997 districtings. Based solely on these facts and the section 5 filings that accompanied the plans (and demographic evidence that, as we discussed above, is insufficient to sustain plaintiffs' case), the plaintiffs' expert Dr. Weber opined that race had predominated in all of the City's districting since 1991. Certainly, this material establishes that race was a factor in prior districtings, and that the form of those districts was largely reenacted in 1997. It also establishes an intention on the part of the City to establish minority-majority districts. And, a glance at the district maps verifies that the City's original plan was more compact than the ones subsequently adopted.

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12. One piece of evidence that might have proven extremely helpful for the plaintiffs' case in this regard would be transcripts of Council debates surrounding the adoption of the prior plans. While the 1997 debate is in the record, the earlier ones are not. Had those debates been as open and detailed as the 1997 record, they perhaps could have proven decisive against summary disposition here.

But the City has always conceded these points, and as we discussed above the sacrifice in compactness was not extreme. And this Court has interpreted the Supreme Court's current position to include a majority in favor of Justice O'Connor's statement in *Bush* that the intentional creation of minority-majority districts will not in and of itself trigger strict scrutiny. *See Bush*, 116 S.Ct. at 1951; *Clark*, 88 F.3d at 1404 n.2; *Theriot*, 185 F.3d at 488. The plaintiffs' burden was thus to show that race predominated over traditional districting concerns, not merely that the City attempted to craft minority-majority districts and that there was some but not massive reduction of one such factor--compactness. Here, all that has been demonstrated is that the DOJ aggressively forced a consciousness of race and the Voting Rights Act upon the City. The City then abandoned its initial plan--one presumably grounded firmly in traditional districting principles-and ultimately adopted a system that met the DOJ's requirements. Were districting an exact science, in which the application of traditional districting principles always produced one objectively optimal solution, this would perhaps settle the question--abandonment of the optimal traditional plan would demonstrate subordination. But districting is hardly a science. It would seem obvious to us that there is more than one way to draw a district so that it can reasonably be described as meaningfully adhering to traditional principles, even if not to the same extent or degree as some other hypothetical district.

If, in the wake of the DOJ's intervention, the City had returned to the problem and properly considered race as a factor alongside traditional districting principles, and the result they reached had satisfied the DOJ without substantially abandoning those principles, race would not automatically have predominated. For example, the City could have returned to the drawing board and generated a plan that increased the recognition of communities of interest *and* satisfied the DOJ's

racial concerns.[13] The fact that compactness was somewhat lessened in the process would not establish that strict scrutiny was required, because race might not have predominated over communities of interest. Thus abandonment of an original plan by itself does not demonstrate that race predominated--the adopted plan may have also been the product of and substantially consistent with traditional districting principles. The plaintiffs failed to offer any evidence that this did not in fact occur. As discussed above, the plaintiffs failed to show specific areas in which communities of interest were subordinated to race, and they never claimed that the original plan was a more adequate reflection of that traditional districting principle than those that followed. The plaintiffs' expert, Dr. Weber, conceded that he did not take into account the City's desire to reflect communities of interest, since he believes that the criteria used to measure this concept are themselves closely correlated with race.

While the rabid extremes of the DOJ conduct in *Miller* should hardly stand as a minimum litmus test in such matters, it

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13. Presumably, there is a platonic ideal form covering each of the traditional districting principles, and they will not always overlap. For example, adherence to administrative boundaries will by its very nature subvert mathematical compactness, since these units are not uniform. When a factor is legitimately raised, it will always in a sense subordinate other factors--the raising of political concerns will interfere with compactness or communities of interest or race. If, after a plan was laboriously crafted, a Council member objected on the grounds that it severed his residence from his district, and changes were then made, this rejection and alteration of the plan would show that political concerns were a factor. But the fact that a finished plan was rejected would not in and of itself show that this political input predominated. One or more other factors would surely be sacrificed, but not only the political concern that drove it but also other factors might be advanced. Ultimate approval of the change might be based not only on the grounds that led to it being proposed, but also because of the other interests it advanced.

would seem to us that a plaintiff is required to do more than merely demonstrate that the DOJ had somewhat effective input in the process to trigger strict scrutiny. "It is not Justice Department interference per se that is the concern, but rather the fact that Justice Department pressure led the State to act based on an overriding concern with race." *Abrams*, 117 S.Ct. at 1934. And that is all the plaintiffs have really done here. The DOJ will almost always have this kind of input into the districting decisions of jurisdictions covered under section 5. At least in those jurisdictions, then, accepting the plaintiffs' minimal showing here would render Justice O'Connor's allowance for the creation of minority-majority districts of merely academic interest. In the process, such a rule would in practice narrow what is already a difficult passage through the Scylla of the Voting Rights Act and the Charybdis of *Shaw* nearly to the vanishing point-virtually every decision the jurisdiction made would run aground on the rocks of litigation. Here, for example, the City would have surely run into trouble had it disregarded the DOJ's suggestion regarding the creation of more minority concentrations. But by the mere fact of heeding these objections, plaintiffs claim, the City automatically exposed itself to a lawsuit triable under strict scrutiny. DOJ's overreaching will occasionally inflict this dilemma in any event--to exacerbate the problem by making it an ironclad rule would seem inadvisable.

Given the fact that the plaintiffs bore the burden of proof on this issue, and the presumption in favor of the Council's good faith, the plaintiffs needed to undercut the hypothesis that the City's plans were independently substantially justified by traditional districting factors. They failed to do so. An obvious mechanism would be to use circumstantial evidence based on the districts' shape and demographics to shore up the direct evidence of intent. But as discussed above, the plaintiffs' circumstantial evidence is inadequate to allow a finding that race predominated. Nor did the plaintiffs point to adequate direct

evidence that the compliance with the DOJ's desires was the predominate, driving force behind the plan, rather than merely one factor, along with traditional ones, in the overall equation. *Cf., e.g., Abrams*, 117 S.Ct. at 1934 (discussing direct evidence from drafter of plan that preceded the one challenged in *Miller* that he viewed draft including two majority-minority districts, that it was viewed as ridiculous and not making sense, and going on to note testimony of legislators that indicated that all other considerations yielded to DOJ desire to maximize minority districts).

And in any case, while the district court erred in categorically and totally dismissing evidence of intent garnered from prior plans, it was correct to point out that the state of mind involved in the prior plans is not of itself what is precisely and directly the ultimate issue before the Court in this case. We have noted in a different context that while under *Hunter* the discriminatory intent of the original drafter may carry forward despite subsequent judicial invalidation of the most obviously discriminatory provisions, intervening reenactment with meaningful alterations may render the current law valid. *See Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1988) (while disenfranchisement constitutional provision originated in attempt to discriminate, subsequent reenactment with alterations approved by voters added categories of crimes originally excluded because they were not considered "Black" crimes and subtracted a less serious offense that had been considered a "Black" crime). We do not suggest that the changes implemented in 1993, 1995, and 1997 to the original framework were as dramatic as those in *Cotton*. However, that case broadly stands for the important point that when a plan is reenacted--as opposed to merely remaining on the books like the provision in *Hunter*--the state of mind of the reenacting body must also be considered.

Here, the passage of time lent an additional element to the Council's intent. Maintenance of established district lines is itself a traditional districting principle, and the City included it in its guidelines for the 1997 revision. And the adopted plan minimized the changes in district boundaries. Standing alone, that would not matter much here--the mere passage of six years cannot have hallowed the current districts with much familiarity or tradition. But in the context of the approaching census, this principle would seem to have some validity. As discussed above, the City had before it when it voted on the plan information indicating that a radical revision of its boundaries (for its soon to follow elections) will be necessary in light of the 2000 census. What the district court characterized as a "scorched-earth" redrawing of the districts--what Dr. Weber's views would have logically required to purge all taint of DOJ interference-would have little to recommend it under the circumstances. Such ground-up revisions are difficult to implement, and as one Council member argued, can be "wholly disruptive toward the political and neighborhood relationships we have established in the city." This fact hardly justifies the "freezing" of district lines in the manner the district court seemed to endorse. However, it does caution against wholesale alteration based on out-of-date census figures when the process will in any case have to be done in the immediate future. In the context of close proximity to the census (with new elections soon to follow), we think that residual doubt as to the appropriateness of summary judgment is extinguished by the fact that the City had valid reasons to adhere to its prior borders distinct from the grounds which led to their adoption.

Thus, although the issue on appeal is extremely close, we ultimately conclude that the district court correctly dismissed the plaintiffs' *Shaw* claim. On this record, we cannot say that plaintiffs have carried their burden and made a sufficient showing, either circumstantially or directly, to sustain a finding

that race predominated in the districting. We stress that our decision here rests largely on the evidentiary shortcomings in the plaintiffs' case. We would also add that in our analysis of the direct intent evidence we relied on the rapid approach of the census, and the City's expectation that a major overhaul of districts (and soon to follow elections) will occur at that time. Our opinion here cannot be read as a conclusive endorsement of these districts' constitutional status, since on better showing by the plaintiffs the result might well have been different. Nor can it be viewed as an open invitation to the City to maintain the current boundaries and overall structure in the redistricting that follows the 2000 census. *See Campos v. City of Houston*, 113 F.3d 544, 548 (5th Cir. 1997) (clarifying proper standard of measurement under section 2); *id.* at 545 (discussing pattern of election results); *United States v. City of Houston*, 800 F.Supp. 504, 508 (S.D. Tex. 1992) (Jones, J.) (discussing election results and question of safe versus marginal districts in the retrogression context).

IV. One Person, One Vote

Plaintiffs also contend that the votes of residents of several districts were devalued by the City's deliberate undersizing of minority voting districts. The heart of this one-person, one-vote claim is that the City, despite being aware that it contained pockets with extremely high ratios of noncitizens, improperly crafted its districts to equalize total population rather than citizen voting age population (CVAP). The plaintiffs argue that when total population is obviously an imperfect proxy for potential voters, the City is constitutionally required to use a more accurate measurement of voters. And using CVAP figures, it is clear that several Houston districts fall outside the ten percent threshold established as a safe-harbor for population variance in municipal election districts. The district

court rejected this claim, and for slightly different reasons we agree.

The Equal Protection Clause requires that representatives to an elected body be drawn from voting districts of substantially equal population. *Reynolds v. Sims*, 84 S.Ct. 1362 (1964).[14] This guarantee extends to local elections. *See Avery v. Midland County*, 88 S.Ct. 1114 (1968). However, because state and local elections are not subject to the explicit commands of the Constitution regarding federal elections, they are not held to a standard of absolute population equity. *See Brown v. Thompson*, 103 S.Ct. 2690, 2695-96 (1983) (state must make only a good faith effort to ensure population equity and may balance population against other legitimate concerns). If the maximum variation between districts exceeds a certain threshold, the state will be required to justify the variance by invoking such concerns. *Mahan v. Howell*, 93 S.Ct. 987 (1973) (16.4% variation justified by constraints of political subdivision lines). However, below a certain threshold the plaintiff has failed to establish a *prima facie* case and the districting body will not be required to justify minor variations. *See Gaffney v. Cummings*, 93 S.Ct. 2321, 2330 (1973). The Court has indicated that this threshold is ten percent. *See, e.g., Connor v. Finch*, 97 S.Ct. 1828, 1833 (1977) (setting threshold at ten percent). Here, the maximum variation between the City's

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14. See, e.g., *id.* at 1385 "... the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the state," and 1390 "the Equal Protection Clause requires that a state make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."

districts was found by the district court to be 8.63% when measured by total population, and the plaintiffs have never claimed that using this population base the variation exceeds 10%. The plaintiffs would thus appear to have failed to make out a *prima facie* case.[15]

The plaintiffs argue, however, that the City's districts do shatter the ten percent threshold once the proper measurement of voters in utilized. They argue that they have thus made out a *prima facie* case of vote dilution. Plaintiffs contend that data available to the City indicated that areas with concentrated Hispanic populations had an extremely high number of

15. The plaintiffs complain that three of the four minority districts are undersized relative to a hypothetical ideal district. Three minority districts are indeed undersized, and one of them is the smallest district in the City. The City concedes that this is the case, and also concedes that this fact is at least partially traceable to concerns that the 1990 census undercounted minorities. At the time the basic outlines of the districts were constructed, the City claims that it believed that there might be a revision of the census, and thus predominantly minority districts were undersized to prevent them from later being viewed as oversized. Based on the limited information in the record and the City's statement, it appears clear that this undersizing was not based on any scientific measurement designed to correct for perceived flaws in the census. Nor was it applied equally to the minority population--only minorities living in certain districts were affected. Had it been shown that the City's districts breached the ten percent threshold when either of these manipulations were removed or when they were applied properly to all minorities in the City, the City's hasty and unscientific methods to adjust the census might well have created a violation. However, plaintiffs have not shown, or even claimed, that this is the case. And even if the ten percent *de minimis* threshold is not viewed as an absolute bar, we cannot say on this sparse record that a reasonable fact finder could find that the City's decisions here evidenced the "bad faith, arbitrariness, or invidious discrimination" courts have required in cases involving variations under ten percent. *See Daly v. Hunt*, 93 F.3d 1212, 1220-21 (4th Cir. 1996).

noncitizens. They argue that given this well-known fact, the City should have recognized that total population would not serve as a meaningful proxy for potentially eligible voters--areas with concentrations of Hispanics would have a far larger population than potentially eligible voters. By nevertheless continuing to use total population, the City devalued the votes of residents in districts that did not contain concentrations of Hispanic voters. They argue that when measured against the proper standard, the City's districts displayed a maximum variance well in excess of the allowable ten percent. We have had cause before to note the high number of Hispanic residents of Houston who are not citizens. *See Campos v. City of Houston*, 113 F.3d 544, 547 (5th Cir. 1997) (census figures indicate 45.8% of adult Hispanics in City are noncitizens). And the plaintiffs have produced data that appears to clearly show that when the CVAP of Houston districts is compared, the maximum variance indeed exceeds the ten percent threshold. If the City were required by the Equal Protection Clause to use CVAP rather than total population in crafting its districts, then, summary judgment for the city would have been inappropriate. However, while this is a close question, we find that the choice of population figures is a choice left to the political process. Houston did not violate the Equal Protection Clause.

Plaintiffs' argument is straightforward. A *Reynolds* claim is, after all, a "'one person, one vote'" claim. *See Reynolds*, 84 S.Ct. at 1380 (quoting *Gray v. Sanders*, 83 S.Ct. 801, 809 (1963)). Since the inquiry focuses on the dilution of *votes*, it would be improper to allow the votes of two adult citizens to be weighed equally with the vote of a single adult citizen merely because the latter happened to live in proximity to a noncitizen ineligible to vote.[16] Plaintiffs concede that under many, if not

16. Clearly, the United States Constitution does not forbid the states from restricting the franchise to citizens. See, e.g., *Sugarman v. Dougall*, 93

most, circumstances this distinction will be irrelevant--generally, the ineligible to vote or to register to do so (whether felons, minors, or noncitizens) can be assumed to be evenly distributed throughout the area to be districted, and the usage of total population is thus an acceptable surrogate for measuring potential voters. When, however, a districting body knows that large numbers of those ineligible to vote are disproportionately concentrated in certain areas, it can no longer in good faith use

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S.Ct. 2842, 2851 ("This Court has never held that aleins have a constitutional right to vote or to hold high public office under the Equal Protection Clause. Indeed, implicit in many of this Court's voting rights decisions is the notion that citizenship is a permissible criterion for limiting such rights"); *id.* at 2851 n.13 ("In congressional debates leading to the adoption of the Fourteenth Amendment, there is clear evidence that Congress not only knew that as a matter of local practice aliens had not been granted the right to vote, but that under the amendment they did not receive a constitutional right of suffrage or a constitutional right to participate in the political process of state government, and that, indeed, the right to vote and the concomitant right of participetion in the political process were matters of local law."). *See also Foley v. Connelie*, 98 S.Ct. 1067 at 1070 (1978) ("... we have recognized 'a state's historical power to exclude aliens from participation in its democtractic political institutions' ... as a part of the sovereign's obligation 'to preserve the basic conception of a policial community,'" quoting *Dougall*, 93 S.Ct. at 2850). The voting rights protections of the Fifteenth, Nineteenth, Twenty-Fourth and Twenty-Sixth Amendments are restricted to "citizens," as is section 2 of the Voting Rights Act, 42 U.S.C. § 1973. The protection of the Fourteenth Amendment's Privileges And Immunities Clause, which has been said to embrace "the right to vote for national officers," *Twining v. New Jersey*, 29 S.Ct. 14, 19 (1908), is limited to "citizens." And, the congressional representation penalty of section 2 of the Fourteenth Amendment is brought into play only by denial of voting rights (except for rebellion or other crime) to adult, male inhabitants who are "citizens."

On the other hand, we are also aware of no provision of the Constitution which expressly or by clear implication prohibits the states from extending the franchise to lawfully resident aliens.

total population as a proxy for potential voters. Instead, it is obligated to deploy a more sophisticated measurement, such as CVAP.

Two circuit courts have addressed this issue. The Ninth Circuit has found that total population is not only a permissible method to measure population when known significant concentrations of those not eligible to vote exist, but has also suggested that its usage may be required under the Equal Protection Clause in some circumstances. *See Garza v. County of Los Angeles*, 918 F.2d 763, 775 (9th Cir. 1990), *cert denied*, 111 S.Ct. 681 (1991) (approving court ordered plan using total population and opining that use of CVAP "would constitute a denial of equal protection to these Hispanic plaintiffs"). The Fourth Circuit, confronting the analogous issue of districting when persons below the voting age were unevenly distributed, has stated that the choice between total population or a measurement of potential voters is left to the legislative body. In doing so, it implicitly rejected the Ninth Circuit's contention that a districting body might be required by the Equal Protection Clause to use total population as a baseline. *See Daly v. Hunt*, 93 F.3d 1212, 1227 (4th Cir. 1996) (remanding on other grounds). However, in a powerful dissent in *Garza*, Judge Kozinski concluded that, at least when the plan is court ordered, the Constitution requires the use of a measurement that accurately tracks potential voters. *See Garza*, 918 F.2d at 785.

The Supreme Court has from the beginning of this line of cases been somewhat evasive in regard to which population must be equalized. *See Reynolds*, 84 S.Ct. at 1390 (state should attempt to apportion "so that each [districting unit] has an identical number of residents, or citizens, or voters"). However, it has also indicated with some clarity that the choice has political overtones that caution against judicial intrusion. *See Burns v. Richardson*, 86 S.Ct. 1286, 1297 (1966) (state not

required to use total population figures, since the choice of measurement "involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere"). The debate does indeed involve questions about the nature of representative democracy. As Judge Kozinski's dissent recognizes, and the *Daly* opinion outlines, there is nothing inherent in the concept of representative democracy that requires the embrace of the plaintiffs' position.

The choice presented is, in Judge Kozinski's terms, one between electoral equality and representational equality. While for the most part obscured by the happy coincidence that eligible voters will frequently track the total population evenly--in which case either measurement would produce similar results, and total population will probably be used since it is easier to gather--this is a fundamental and difficult question. If total population figures are used in an area in which potentially eligible voters are unevenly distributed, the result will necessarily devalue the votes of individuals in the area with a higher percentage of potentially eligible voters. The large populations in the other district will leverage the votes of the smaller number of eligible voters there. However, if a more carefully calibrated measurement is embraced in order to serve this principle of individual electoral equality, the area with the smaller number of voters will find itself relatively disadvantaged. Despite the fact that it has a larger population--and thus perhaps a greater need for government services than the other community--it will find that its political power does not adequately reflect its size. In addition, it could be argued that because the representative chosen from such a district will have a larger number of constituents, the ability of her constituents--whether or not they are potential voters--to petition and voice their opinions will be proportionately reduced. *See Garza*, 918 F.2d at 775. *But see Daly*, 93 F.3d at

1226-27 & n.12 (expressing doubt regarding validity of equal access argument). If one accepts the principle of representational equality--that representatives are chosen by a district's voters, but should represent all persons resident therein--these results may be unacceptable. The choice between these two models is stark, and because it is rarely encountered, historical and legal guidance is sparse.

Judge Kozinski makes a powerful case that the general tenor of the Court's opinions mandates protection of the individual potential voter. Certainly, to take just a few examples contained in Judge Kozinski's comprehensive summary, there is ample language in the opinions that strongly implies that it is the right of the individual potential voter that must be protected. *See, e.g., Reynolds*, 84 S.Ct. at 1384 ("the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment . . . . To the extent that a citizen's right to vote is debased, he is that much less a citizen . . . . the basic principle of representative government remains, and must remain, unchanged--the weight of a citizen's vote cannot be made to depend on where he lives"); *Gaffney*, 93 S.Ct. at 2328 (noting that among the variations that made absolute fidelity to population equality impossible was the gap between total population and potential voters, and stating that "if it is the weight of a person's vote that matters, total population...may not accurately reflect that body of voters").

But as Judge Kozinski admits, and as the *Daly* court highlights, other language can be found that implies that representational equality is the ideal. *See, e.g., Mahan*, 93 S.Ct. at 983 ("the basic constitutional principle [is] equality of population among the districts"). While it does appear that the numerical weight of references is on the side of electoral

equality, it is difficult to attach controlling significance to this fact, since in almost all cases the Court was dealing with situations in which total population was presumptively an acceptable proxy for potentially eligible voters. Under such circumstances, we would expect to find the terms used interchangeably, with perhaps a slight bias toward the more historically resonant phrase--unquestionably, one-person, one-vote. Support for this interpretation is provided by the fact that some of the language Judge Kozinski relies on is contradicted by statements within the same opinion. *See Reynolds*, 84 S.Ct. at 1385 ("We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats . . . must be apportioned on a population basis"); *Wastberry v. Sanders*, 84 S.Ct. 526, 530 (1964) ("To say that a vote is worth more in one district than in another would . . . run counter to our fundamental ideas of democratic government"); *id.* at 535 ("our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives"). While fully recognizing the force of Judge Kozinski's argument, we think that the cases he cites are not decisive, given the strong possibility that much of the language he relies on may be traceable to the use of terms interchangeably in a context where their meaning does not diverge.

Instead, we turn to *Burns*, where the Court directly confronted an actual differential between the concepts. We read *Burns* as compelling rejection of the *Garza* majority view that the Equal Protection Clause mandates inclusion of aliens in the population base of electoral districts against which the equality requirements of *Reynolds* are applied. *Burns* states:

> "Neither in *Reynolds v. Sims* nor in any other decision has this court suggested that the States are required to include aliens, transients,

> short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere. Unless a choice is one the constitution forbids, [citation] the resulting apportionment base offends no constitutional bar, and compliance with the rule established in *Reynolds v. Sims* is to be measured thereby.
>
> . . . .
>
> Hawaii's special population problems might well have led it to conclude that state citizen population rather than total population should be the basis for comparison." *Id.* at 1296-97 (footnote omitted).

For this reason, we believe the district court erred to the extent it relied on the *Garza* majority dicta.[17] Judge Kozinski argues

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17. Our conclusion in this regard is also strengthened by the fact that, as observed in note 16, *supra*, the constitution does *not* preclude states from denying the franchise to aliens while it explicitly protects "citizens" from such denial on diverse specified grounds. Moreover, the Equal Protection Clause has been construed to in most cases preclude the denial of the franchise to *citizens* by means of property ownership or similar qualifications for voting. *See, e.g., Kramer v. Union Free School District*, 89 S.Ct. 1886, 1889 (1969) ("close scrutiny . . . is applicable to statutes *denying* the franchise to *citizens* who are otherwise qualified by residence and age;" second emphasis added , footnote omitted). In these

that *Burns* should be determinative for electoral equality, since there the Court allowed a plan that used an even more nuanced measure of voting strength--registered voters. But we are reluctant to read *Burns'* allowance of such a measure into a command in the face of what appears to us to be a clear statement to the contrary in the same opinion--that the choice between measurements "involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere". *Burns* at 1297.

We also note that the drafters of the Fourteenth Amendment, on which *Reynolds* itself rests, do appear to have debated this question, and rejected a proposal rooted in--among other things--the principle of electoral equality. On December 5, 1865, Representative Stevens introduced a constitutional amendment which apportioned congressional representation among the states "according to their respective legal voters; and for this purpose none shall be named as legal voters who are not either natural-born citizens or naturalized foreigners." *See* Joseph T. 61 Sneed III, *Footprints on the Rocks of The Mountain: An Account of the Fourteenth Amendment* at 35 (1997) (*Footprints*). Debates over the precise basis for apportionment of Congress among the states proved a contentious issue throughout the process that led to the creation of section 2 of the Amendment. The overriding question driving this debate was the issue of how to deal with the denial of the franchise to African-Americans. However, as the inclusion of a citizenship provision indicates, an undercurrent of this debate was the recognition by many representatives that aliens were

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circumstances, it is, at the very least, counter-intuitive to say that the Equal Protection Clause mandates that the right of citizens to vote be diluted to the extent necessary to prevent dilution of a representational right, unmentioned in the Constitution, of aliens who have no right to vote.

unevenly distributed throughout the country. In addition, several western states contained an overabundance of males, which, as women were generally not eligible to vote, would disadvantage them relative to settled eastern areas in which the genders were balanced if total population rather than eligible voters were used. Some of the debate over whether to base apportionment on potential voters, citizens, or population can be tied to this issue.[18]

To be sure, the overall context in which the amendment was drafted prevents any firm conclusion being drawn as to the framer's intent regarding the question before us. However, we find it is of some significance that the proponents of the Fourteenth Amendment had a meaningful debate on the question, which cannot be said to have been definitively resolved.[19] While the final version of section 2 provided

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18. *See Footprints* at 103-104 (noting proposals to use citizenship as a benchmark faced opposition from northern states with large alien populations that might imperil passage); 145 (relating speech of Senator Hendricks on February 16, 1866, in which he claimed opposition of New England to proposal to use eligible voters rather than total population was grounded in part in the relative preponderance of women in those states); 415 (reviewing debate on proposed language of section 2 basing representation on citizenship, in which representative from New England argued its omission of 2.1 million unnaturalized foreigners would unjustly weaken the North, while proponent argued that a citizen of Massachusetts should not "be entitled to vote on behalf of unnaturalized foreigners who happened to live in Massachusetts").

19. The evidence suggests that proponents of absolute electoral equality compromised this principle in order to assure passage of the amendment. *See Footprints* at 415 (noting that Sherman stated that while he preferred a provision that would be based on male citizens, the time had come to unite around a common proposal and he would yield to the decision of the Republican caucus); *Reynolds* at 1399, 1402 (Harlan J. dissenting).

It would thus be difficult to read the eventual passage of the total

generally for the use of total population figures for purposes of allocating the federal House of Representatives among the states, it also included a mechanism to insure that egregious departures from the principle of *electoral* equality--the disenfranchisement of adult male "citizens"--would be penalized. Bearing in mind that analogies drawn from the federal system are not always applicable to the states, *see Reynolds*, 84 S.Ct. at 1386-89, we have some difficulty in reading the Equal Protection Clause to require the adoption of a particular theory of political equality.[20]

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citizen provision as an endorsement by a majority of the Congress of representational equality, even putting aside the electoral equality provisions of the second section of section 2.

20. Under Article I, section 2, of the Constitution, the number of representatives which each state would have in the United States House of Representatives was determined on the basis of "the whole number of free persons" ("excluding Indians not taxed") plus "three fifths of all other persons" ("but each State shall have at least one Representative"). Voting qualifications were whatever was specified by each state for the most numerous branch of its legislature. With ratification of the Thirteenth Amendment on December 6, 1865, all were "free persons," so the former slave states would presumably have increased representation in Congress despite still denying the vote to African-Americans. This problem, which faced Congress in late 1865 and the first part of 1866, could be addressed in different ways. Denial of the right to vote on grounds of race could be expressly proscribed. That route was taken in the Fifteenth Amendment, but not in the Fourteenth. Representation in the federal House could be allocated among the states on the basis of the number of potentially eligible voters. That choice, too, was rejected. The solution ultimately adopted in the Fourteenth Amendment was to *retain* the *existing* structure of Article 1, section 2-*including the right of the states to prescribe voting qualifications* and the entitlement of each state to at least one Representative-*while* eliminating the "three fifths" clause and *providing for a proportional reduction* in the federal House representational base of any state to the extent "the right to vote" (in federal or most state elections) was "denied" (except for rebellion or other crime) to adult male "citizens" of the

While hardly determinative, our review of the history of the amendment cautions against judicial intrusion in this sphere--either for or against either particular theory of political equality. Given this, and given the Court's failure, on our reading, to speak clearly to such a vital question, we see no justification to depart from the position of *Daly*. We reject the conclusions of both the dissent in *Garza* and any reading of the majority opinion in that case that would mandate the use of total population figures on equal protection grounds. We thus conclude that the district court correctly determined that the plaintiffs failed to create an issue of genuine material fact in respect to the City's adherence to the one-person, one-vote principle.

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state. The essential focus of the debates was on two matters: allocating representation of the states in the United States House of Representatives, and the right of African-Americans to vote. It was *not* on any general representational as opposed to electoral equality theory of government. Both *Footprints* and Justice Harlan's dissent in *Reynolds* make plain that the intent of the framers of the Fourteenth Amendment, as reflected in its legislative history, was to continue to leave electoral and representational rights in the control of the states to the same extent as they had been before the Civil War *except* that a state's representation in the federal House of Representatives would be subject to reduction on account of denial by it of "the right to vote" of its adult, male "citizens." While the majestic and open-ended generality of the Equal Protection Clause must be assumed to have justified *Reynolds'* failure to accord controlling significance to this legislative history, that majestic generality casts no meaningful light whatever on whether the states were thereby commanded to chose undiluted representational equality over undiluted electoral equality, or vice versa, where one or the other must be diluted, or were essentially left as free to make that choice as they had previously been.

Plaintiffs make no argument that state law or the Houston City Charter mandates use of CVA population.

Conclusion

The record is not such as to sustain a finding that race predominated in the City's decision-making. While the plaintiffs were able to point to bits and pieces of the City's plan that might have created a valid *Shaw* claim, they failed to produce evidence that would have surmounted the summary judgment threshold. The propriety under the Equal Protection Clause of using total population rather than a measure of potential voters also presents a close question. But in face of the lack of more definitive guidance from the Supreme Court, we conclude that this eminently political question has been left to the political process.

For the reasons stated, the judgement of the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EDWARD CHEN, *et al.*,	)	
Plaintiffs	)	
	)	CIVIL ACTION NO.
v.	)	H-97-1180
	)	
CITY OF HOUSTON,	)	
Defendant.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
MAY 06 1998
Michael N. Milby, Clerk

MEMORANDUM OPINION

I. INTRODUCTION

Plaintiffs, residents of the Defendant City of Houston (the "City,")[1], filed this voting rights case alleging that the City engaged in racial gerrymandering in developing its 1997 city council redistricting plan. The 1997 redistricting was required because the City in late 1996 annexed the Kingwood area with a population of over 40,000 and three other populated areas

1 Plaintiff Edward Blum ("Blum") is no longer a resident of the City of Houston and is one of the subjects of the City's Motion to Dismiss Plaintiffs Edward Blum and Al Vera ("Vera") [Doc. # 63].

with a combined population of almost 5,000 persons.[2] In July 1997, the City's 1997 redistricting plan received Department of Justice preclearance pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c ("Section 5"). Plaintiffs allege that the City's decision to assign the newly-annexed Kingwood area in northeast Houston to the Clear Lake area in southeast Houston as District E violates several provisions of the United States Constitution. Specifically, Plaintiffs allege that the 1997 redistricting plan violates the requirement for ballot secrecy; violates their rights under the First Amendment to petition for redress of grievances and to assemble for political purposes; violates their rights under the Equal Protection Clause to associate with fellow citizens for political purposes and to advocate for the candidate of their choice; and violates the Equal Protection Clause's "one-person, one-vote" principle. Plaintiffs also allege that the 1997 redistricting plan constitutes racial gerrymandering in violation of the Fourteenth and Fifteenth Amendments.

The case is now before the Court on the City's **Motions for Summary Judgment** [Docs. # 59, # 60, # 62, # 61 and # 55] as to each of these five claims, and on the City's **Motion to Dismiss Plaintiffs Blum and Vera** [Doc. # 63].[3] Plaintiffs have filed their opposition to the Motions, and the City has filed its Replies. Plaintiffs, without leave of court, subsequently filed a further response to the City's Replies. Plaintiffs' Brief in Further

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2 The Kingwood annexation was unique because of its size; it was "twice as big as all the annexations [the City] had done during the 90s, prior to that time." Deposition of Jerry Wood, Exh. C to Plaintiffs' Response to Motion for Summary Judgment on Fourteenth and Fifteenth Amendment Claims [Doc. # 67], at 104.

3 The Motion to Dismiss was also docketed, improperly, as Doc. # 66.

Opposition to Defendant's Motion for Summary Judgment on Fourteenth and Fifteenth Amendment Claims [Doc. # 83] ("Plaintiffs' Surreply"). Based on the Court's careful consideration of the entire record in this case, the evidence presented by the parties, and the applicable authorities, the Motions each are **GRANTED**.

II. APPLICABLE LEGAL STANDARDS

A. Standard for Summary Judgment

The United States Supreme Court has held that a motion for summary judgment is properly granted unless there is evidence "on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. . .." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Rule 56 is an integral part of the Federal Rules of Civil Procedure, recognizing a party's right to demonstrate that certain claims have no factual or legal basis and to have those unsupported claims disposed of prior to trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Because of the "sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments," and the "intrusive potential of judicial intervention into the legislative realm," federal courts should carefully apply the proper summary judgment analysis when assessing "the adequacy of a plaintiff's showing at the various stages of [redistricting] litigation and determining whether to permit discovery or trial to proceed." *Miller v. Johnson*, 515 U.S. 900, 916-17 (1995).

"Summary judgment is required when the evidence, viewed in the light most favorable to the nonmoving party, presents no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Sanders v. Casa View Baptist*

Church, 134 F.3d 331, 334 (5th Cir. 1998). The burden is on the nonmovant to demonstrate with "significant probative evidence" that there is an issue of material fact warranting a trial. *Texas Manufactured Housing Ass'n v. Nederland*, 101 F.3d 1095, 1099 (5th Cir. 1996), *cert. denied*, ___U.S.___, 117 S. Ct. 2497 (1997). The nonmovant's burden cannot be satisfied by conclusory allegations, unsubstantiated assertions, metaphysical doubt as to the facts, or a mere scintilla of evidence. *Douglass v. United Services Automobile Ass'n*, 65 F.3d 452, 459 (5th Cir. 1995), *revised on other grounds*, 79 F.3d 1415 (5th Cir. 1995)(*en banc*); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)(*en banc*).

B. Standard for Article III Standing

An alleged lack of Article III standing is a basis for a motion to dismiss and several motions for summary judgment filed by the City. The Motion to Dismiss Blum and Vera is based on the City's position that Plaintiff Blum does not have standing because his claims are moot, and that Plaintiff Vera does not have standing because he is not a properly registered voter in the City. Additionally, the City's Motions for Summary Judgment on the Ballot Secrecy, the First Amendment, the Equal Protection, and the One-Person One-Vote Claims are based in part on the City's position that Plaintiffs' admissions during deposition testimony establish that they lack standing to assert those particular claims.

An element of the case and controversy requirement of Article III of the United States Constitution is that a plaintiff must have standing to assert the claim or claims presented in the complaint. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A plaintiff does not have Article III standing unless three requirements are satisfied:

> First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be "fairly . . . traceable to the challenged action of the defendant, and not... the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative,' that the injury will be "redressed by a favorable decision."

504 U.S. at 560-61 (citations omitted); *Gore, Inc. v. Espy*, 87 F.3d 767, 771 (5th Cir. 1996). The party invoking federal jurisdiction bears the burden of establishing these three elements. *Lujan*, 504 U.S. at 561.

III. MOTION TO DISMISS BLUM AND VERA

The City has filed a Motion to Dismiss Plaintiffs Blum and Vera [Doc. # 63] ("Motion to Dismiss") based on an alleged lack of Article III standing. To challenge the City's redistricting plan, a plaintiff must be a resident of the district which he seeks to challenge. *United States v. Hays*, 515 U.S. 737, 745 (1995).

A. Plaintiff Blum

It is undisputed that Plaintiff Blum does not currently live within the City. Blum Deposition ("Depo."), Exh. A to Motion to Dismiss, at 6. Blum does not anticipate voting in any City elections while living at his new address. *Id.* As a result, Blum no longer has a personal stake in the outcome of this

proceeding, in which only injunctive and other prospective relief is sought. Blum's claims are dismissed as moot.

B. Plaintiff Vera

Plaintiff Vera has not been a resident of District H, the only district in which he is registered to vote, since 1978. Vera Second Interrogatory Response, Exh. C to Motion to Dismiss, at # 4. He has lived at his current address, which is in District A, since October 1990. *Id.*; Vera Depo., Exh. B to Motion to Dismiss, at 5. Prior to October 1990, Vera lived at 14818 Weil Place. Vera Depo. at 35-36. The Weil Place address is in District B. Declaration of Sherry McCall, Exh. E to Motion to Dismiss.

To qualify as an eligible voter in District H under the Texas Election Code, an individual must be a resident of that district. Texas Election Code § 11.001(2). A person's residence is defined as his "domicile, that is, one's home and fixed place of habitation to which one intends to return after any temporary absence." Texas Election Code § 1.015(a).

Vera argues that District H remains his residence because his "intentions, if they ever would come true, are to move back" to that district. Vera Depo. at 7-8. Vera has neither alleged nor presented evidence that he is temporarily away from District H for employment, health or financial reasons.[4] Indeed, the

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4 In many cases, voters who are away from their prior residences for employment, health or financial reasons are nonetheless found by the Texas courts to be residents of their new home, not of the prior residence. *See Slusher v. Streater*, 896 S.W.2d 239, 246 (Tex. App.– Houston [1st Dist. 1995, no writ) (voter who for health and financial reasons moved from Kemah, where she had lived since she was a small child, to a federally-subsidized rental apartment in Dickinson held not to be resident

undisputed evidence establishes that Vera has chosen to live in the City in districts other than District H for approximately twenty years. His claimed intention to return some day, which Vera concedes may not "come true," if not legally frivolous, is patently insufficient as a matter of law to support a finding that Vera is a current resident of District H. *See Alvarez v. Espinoza*, 844 S.W.2d 238, 248 (Tex. App.--San Antonio 1992, *writ dism 'd w. o. j.*) (although claimed intention to reside in the district, voter had not actually lived within the district for several years).

Vera's reliance on his having improperly continued to vote in District H and to serve in election positions serving District H during the past twenty years is misplaced.[5] There is no evidence that Vera advised the voter registrar that he had moved from the address in District H as required by section 15.021(a) of the Texas Election Code. Vera cannot establish that he is currently a resident of District H based on having failed to comply with applicable state law and, thereby, having successfully avoided detection of his change of residence.

Vera also cannot establish that he is currently a resident of District H based on newspaper accounts of persons registered

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of Kemah); *Zuniga v. Almaraz*, 514 S.W.2d 331, 334-35 (Tex. Civ. App.-- San Antonio 1974, no writ) (voter who for twenty-five years worked in Corpus Christi during the week, but returned to a rented house in Jim Hogg County most weekends, held not to be resident of Jim Hogg County).

5 Vera proffers that he served as the election judge of Precinct 1 in the 1970s and 1980s; that he was selected as a delegate or alternate to the National Republican Convention from Precinct 1 in 1984, 1988, and 1992; and that he was a member of the Electoral College for the congressional district encompassing Precinct 1 in 1992. Response to Motion to Dismiss, Doc. # 69, at 2.

to vote in districts in which they do not reside.[6] The sole issue with reference to the Motion to Dismiss Vera is whether he is a resident of District H for purposes of Article III standing. The media-reported status of other voters is not relevant to this issue.

C. Dismissal of Plaintiffs Blum and Vera

It is undisputed that Plaintiff Blum is no longer a resident of the City. Plaintiff Vera is not a resident of District H and, as a result, his registration there is not effective under Texas law. Vera is not registered to vote in the district of his residence. Plaintiffs Blum and Vera do not have a recognizable personal interest in a favorable outcome in this litigation for prospective relief. *See Lujan*, 504 U.S. at 561. Vera is not suffering an actual injury because he is not properly registered to vote in any district in the City. *See Hays*, 515 U.S. at 745. Consequently, Blum and Vera lack standing and must be dismissed as Plaintiffs.

IV. MOTION FOR SUMMARY JUDGMENT ON BALLOT SECRECY CLAIM

Plaintiffs allege that the City's 1997 redistricting plan created "small or sliver precincts" which resulted in an absence of ballot secrecy in those precincts. Plaintiffs' First Amended Complaint, Doc. # 38, at 14, ¶ 82. The City has moved for summary judgment on this claim based on (1) its use of county election precincts as the geographical unit basis for its districting and (2)

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6 Vera submits newspaper articles from the Houston Press and the Houston Chronicle questioning the residency of Richard Johnson, Rev. Gene Moore, and Abel Davila, who at various times were candidates for office in the City of Houston. Response to Motion to Dismiss Blum and Vera, Doc. # 69, Exh. B, C and D.

the failure of any Plaintiff to identify specific individual harm necessary to establish standing [Doc. # 59]. The Court concludes that the City is entitled to summary judgment based on Plaintiffs' failure to allege individual harm to the secrecy of their ballots.

Each Plaintiff was asked in deposition whether his personal ballot secrecy had been compromised in any way by the City districting plans, either from 1997 or from 1995. None alleged any individual experience involving ballot secrecy.[7] Plaintiff Jon Taylor ("Taylor") testified that he "could have" been harmed, but that he was unable to identify any specific harm. Taylor Depo., Exh. A-7 to Motion for Summary Judgment on Ballot Secrecy Claim, at 40-43. Absent allegations of an actual injury which is "concrete and particularized," Plaintiffs have failed to establish an essential element of the Article III standing requirement. *See Lujan*, 504 U.S. at 560.

Plaintiffs concede that the Harris County Clerk's practice of combining precincts for voting and reporting purposes has countered administratively any problem created by the small precincts, but contend that the continued existence of these small precincts "presents an ongoing threat to ballot secrecy." Plaintiffs' Response to Motion for Summary Judgment on Ballot Secrecy Claim, Doc. # 70, at 2. Plaintiffs argue that this "reasonable fear" of harm is sufficient to establish standing on the ballot secrecy claim, but they cite no legal authority to support their argument. Their argument is contrary to the Supreme Court's decision in *Lujan*, which requires an injury which is "concrete and particularized," and "actual or imminent,

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7 The applicable deposition excerpts of each Plaintiff's deposition are attached to the City's Motion for Summary Judgment on the Ballot Secrecy Claim [Doc. # 59], as Exhibits A.1. through A.12.

not 'conjectural' or 'hypothetical." *Id.*

Plaintiffs have failed to identify any circumstances in which the secrecy of their ballots was compromised by the City's districting plan and have failed to present any authority which supports their argument that the standing requirement may be satisfied by a "reasonable fear" of harm. The City is entitled to summary judgment on the ballot secrecy claim.

V. MOTION FOR SUMMARY JUDGMENT ON FIRST AMENDMENT AND EQUAL PROTECTION CLAIMS

Plaintiffs allege that the City's 1997 redistricting plan resulted in a violation of their First Amendment rights to petition for redress and to assemble for political purposes. Plaintiffs' First Amended Complaint [Doc. # 38], at 14, ¶ 83. In a similar claim, Plaintiffs allege that the 1997 redistricting plan violates their rights under the Equal Protection clause "by the frustration of efforts of the Plaintiffs and especially those persons residing in connectors to associate with other residents and citizens to effectuate political goals, and the frustration of the ability of Plaintiffs and others to advocate for a candidate of their choice without favoritism to the incumbents or other government-favored candidates." *Id.* at 13, ¶ 81. The City has moved for summary judgment on these two claims on the basis that Plaintiffs lack standing [Docs. # 60 and # 62].

Each Plaintiff was questioned during deposition regarding these claims. None was able to identify any occasion on which he was unable to petition the government for redress, to assemble for political purposes, to associate with other citizens for political purposes, or to advocate for the candidate of his

choice.[8] Although Plaintiffs attempt to characterize their deposition responses as "bravado" and the "response of laymen to legal questions,"[9] their inability to allege facts supporting a specific, individual injury resulting from the City's 1997 redistricting plan is fatal to Plaintiffs' standing to assert the First Amendment and Equal Protection claims.

Plaintiffs argue that the 1997 redistricting plan places them in districts in which they may not know the other residents of the district instead of in districts with their current acquaintances. Plaintiffs do not cite any legal authority for this position that electoral districting is required to retain prior associations such that residents of the district are already acquainted with each other. This is not surprising, for it would be an untenable requirement that the City create districts each with approximately 190,000 residents who are all personally acquainted.

Moreover, Plaintiffs do not indicate how the 1997 redistricting plan interferes with their ability to contact and, if Plaintiffs choose, to befriend the other residents of their new districts. As an example, Plaintiff Taylor complains that he does not know people in the Acres Homes area of his district. Taylor Depo., Exh. B to Plaintiffs' Response to Motion for Summary Judgment on Equal Protection Claim [Doc. # 71], at 46. Plaintiff Taylor does not, however, explain how or why he is

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8 The relevant portions of Plaintiffs' depositions are attached to the City's Motions, Docs. # 60 and # 62, as Exhibits A-1 through A-12.

9 Plaintiffs' Response to Motion for Summary Judgment on First Amendment Claim, Doc. # 72, and Response to Motion for Summary Judgment on Equal Protection Claim, Doc. # 71, at 2.

restricted from meeting the Acres Homes residents if in fact he so desires.

Certain Plaintiffs, while conceding that they have not suffered any actual injury, argue that they believe that other citizens might have suffered such an injury. Plaintiff J.E . White, for example, stated in his deposition, "I believe that I have friends or I believe that a certain group of people's rights are being infringed upon, then I will take that also as a personal infringement upon my rights." White Depo., Exh. A-10 to Motion for Summary Judgment on First Amendment Claim [Doc. # 60], at 50. While this concern for others may be admirable, it does not constitute the individualized "injury in fact" required for Article III standing. *See Hays*, 515 U.S. at 746.

Plaintiffs fail to identify any actual injury to their individual rights under the First Amendment or the Equal Protection clause. As a result, Plaintiffs have failed to establish a basis for standing to assert these claims.

VI. MOTION FOR SUMMARY JUDGMENT ON ONE-PERSON, ONE-VOTE CLAIM

Plaintiffs allege that the City's 1997 redistricting plan gathered noncitizens into certain districts which resulted in a concentration of noncitizens in small population "minority" districts in violation of the one-person, one-vote requirement of the Equal Protection Clause as set forth in *Burns v. Richardson*, 384 U.S. 73 (1966). Plaintiffs' First Amended Complaint [Doc. # 38], at 13, ¶¶ 79-81. The City has moved for summary judgment on this claim, arguing (1) that it could not have purposefully gathered noncitizens together as alleged by Plaintiffs because it did not have the noncitizen demographic data at the time it drew the 1993 districting plan from which the

1997 plan was derived; (2) that the apportionment on the basis of total population, including noncitizens, is consistent with established law; (3) that, using total population figures, the districts comply with the one-person, one-vote standard set forth in *Connor v. Finch*, 431 U.S. 407, 417-18 (1977); (4) that Plaintiffs lack standing; and (5) that Plaintiffs have presented no evidence of intent [Doc. # 61].

A. Plaintiffs' Claim of "Purposeful Gathering"

The undisputed evidence is that the City's 1997 redistricting plan is a derivative, through the City's 1995 plan, of the 1993 districting plan. Plaintiffs concede that the 1993 plan was developed before the City obtained specific noncitizen demographic information which would have enabled the "purposeful gathering" of noncitizens alleged by Plaintiffs. Plaintiffs' Response to Motion for Summary Judgment on One-Person, One-Vote Claim [Doc. # 68], at 3. Although Plaintiffs argue that there was general knowledge that many Hispanics were not citizens and that the specific citizenship information was available and could have been requested earlier by the City, it is uncontested that the City did not have the "citizen voting age population" data prior to the 1993 plan.

The City "gathered" its residents in the 1993 plan without access to the citizenship data. Based on legitimate concerns, such as avoiding voter dislocation and confusion and avoiding potential violations of section 5 of the Voting Rights Act, the 1995 and 1997 districting plans retained significant aspects of the 1993 plan. Plaintiffs have presented no evidence that the 1993, 1995 or 1997 plans were designed intentionally to gather noncitizens together into particular districts.

Instead, Plaintiffs argue and present evidence that it was possible to create districts more equal in population. As

discussed below, this argument does not address the correct legal standard. Judicial involvement in the districting process "must end at some point, but that point constantly recedes if those who litigate need only produce a plan that is marginally 'better' when measured against a rigid and unyielding population-equality standard." *Gaffney v. Cummings*, 412 U.S. 735, 750-51 (1973). A districting plan with a maximum population deviation of less than ten percent falls within the "minor deviation" category. *See Connor*, 431 U.S. at 417-18.

B. Use of Total Population Figures

Plaintiffs assert that the City must use citizen population figures instead of total population figures in developing its redistricting plans. Plaintiffs, however, have cited no legal authority to support this proposition. Moreover, the argument previously has been rejected by a federal court in California. *See Garza v. Los Angeles County Board of Supervisors*, 756 F. Supp. 1298 (C.D. Cal.), *aff'd*, 918 F.2d 763 (9th Cir. 1990). As noted by the Ninth Circuit, use of total population figures protects noncitizens' equal protection rights to representation as "persons." *Garza v. Los Angeles County Board of Supervisors*, 918 F.2d 763, 775 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028, 112 L. Ed. 2d 673, 111 S. Ct. 681 (1991). The Court concludes that the City's use of total population figures for its 1997 redistricting plan was consistent with applicable federal law.

C. Variation Under Ten Percent

Redistricting is properly a function of the local governmental entity selected to perform it, and that entity's "work should not be invalidated under the Equal Protection Clause when only minor population variations among districts are proved." *Gaffney*, 412 U.S. at 751. "Minor deviations from mathematical equality . . . are insufficient to make out a prima facie case of

invidious discrimination under the Fourteenth Amendment so as to require justification by the State." *Id.* at 745. The one-person, one-vote requirement is *prima facie* satisfied if the variation in population between the most populous district and the least populous is less than ten percent, considered such a "minor deviation." *Connor*, 431 U.S. at 417-18.

It is undisputed that the applicable variation for the City's 1997 redistricting plan is 8.63%. "On such a showing, [the Court] is quite sure that a prima facie case of invidious discrimination under the Fourteenth Amendment was not made out." *See Gaffney*, 412 U.S. at 751 (district population deviation of "only about 8%" held insufficient to establish a prima facie case).

Plaintiffs' expert, Dr. Ronald Weber has expressed the opinion that a redistricting plan with smaller population disparity was possible by taking into account the noncitizen component of each district. Weber Second Supplemental Declaration, Exh. B to Plaintiffs' Response to Motion for Summary Judgment on Fourteenth and Fifteenth Amendment Claims [Doc. # 67], at 3. Initially, the Court again notes that it is appropriate to use total population figures; the City is not required to use citizen population figures. Additionally, it remains undisputed that the City's 1997 redistricting plan has a population variation of less than ten percent. The possibility that plans with smaller variations could have been designed does not remove the City's plan from the ten percent "safe harbor" set forth in *Connor*.

D. No Evidence of Intent

Intent is an essential element of a Fourteenth Amendment claim. *Washington v. Davis*, 426 U.S. 229 (1976). Plaintiffs have presented no evidence that the City intended to violate the one-person, one-vote requirement when it created the 1993

districting plan, or when that plan was altered to create the 1995 or the 1997 plans. Plaintiffs' argument that a general awareness of data regarding registration of Spanish-surnamed voters provided "a proxy for information regarding citizenship levels in the districts" is unpersuasive.

Plaintiffs' reliance on the deposition testimony of Council Member Orlando Sanchez that "there is a large number of people of Hispanic decent (sic) that are not naturalized citizens" and that they live "in predominantly Hispanic areas" is also misplaced. Sanchez Depo., Exh. B to Response to Motion for Summary Judgment on One-Person, One-Vote Claim [Doc. # 68], at 28. Such evidence of general awareness on the part of political activists that a number of noncitizen Hispanics reside in Hispanic areas is insufficient to raise a genuine issue of material fact as to the City's intent.

The 1991 Committee Notes, attached as Exhibit I to Plaintiffs' Response, also fail to raise a genuine issue of material fact regarding the City's alleged intent to violate the one-person, one-vote requirement. Indeed, the 1991 Committee Notes indicate an awareness of and an intent to comply with *Connor's* ten percent parameter. The 1991 Committee Notes reflect a discussion regarding adjustments to district population based on claims by certain minority groups that they were undercounted in the 1990 census. The discussion addressed the difficulties resulting from the City's need to complete the districting plan before a final decision was due from the Bureau of Census regarding the undercount issue. The Committee expressed a desire to adopt a plan which would "remain within the 10 percent parameter" even were there to be an adjustment by the Bureau of Census. 1991 Committee Notes, Exh. I, at 33.

E. Summary Judgment on One-Person, One-Vote Claim

It is undisputed that the maximum deviation in total population between the most populous district in the City's 1997 redistricting plan and the least populous is less than ten percent. As a result, Plaintiffs cannot establish a *prima facie* violation of the Equal Protection clause's one-person, one-vote principle pursuant to *Connor*, 431 U.S. at 417-18. Absent other evidence of intent, the City is entitled to summary judgment on this claim.

VII. MOTION FOR SUMMARY JUDGMENT ON FOURTEENTH AND FIFTEENTH AMENDMENT CLAIM

Plaintiffs allege that the City's 1997 redistricting plan constitutes racial gerrymandering in violation of the Fourteenth and Fifteenth Amendments because it was based predominantly on racial considerations to the subordination of traditional districting principles. The City has moved for summary judgment on this claim, arguing that the redistricting plan was the result of consideration of all traditional districting principles and that race was not the predominant factor [Doc. # 55].

A. Supreme Court Case Law

Shaw v. Reno. – The United States Supreme Court, in *Shaw v. Reno*, 509 U.S. 630 (1993), recognized a cause of action where the redistricting decisions were based predominantly on racial considerations to the subordination of traditional districting principles. The *Shaw* Court further recognized, however, that in redistricting matters "the legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination." *Id.* at 646.

In *Shaw*, the Supreme Court noted that one indicator of such racial gerrymandering is the presence of "bizarre" and extremely non-compact shapes which can be explained only as the result of race-based considerations. *Id.* at 649. In the City's 1997 redistricting plan, the boundaries are not so bizarre that they could only be explained as the result of predominantly race-based considerations. The unusual shape of the districts, particularly District E in which Kingwood is included, is attributable not to the decision-making of the City on the redistricting issue, but to the City's ability to annex areas through the use of extremely narrow connectors. Both Kingwood and the Clear Lake community to which it is joined were annexed with such narrow connectors that any district including these areas would unavoidably have an irregular shape. Plaintiffs attempt to characterize the "bizarre shape" of the districts and of the City as disputed factual allegations. Plaintiffs' Surreply, at 5. It is undisputed that the districts, particularly District E, are unusually shaped. The City has presented evidence, discussed herein, that the City itself has an irregular shape as a result of using very narrow connectors to annex property into the City. Plaintiffs have presented no evidence to the contrary. For instance, they have not suggested an alternative districting plan in which the district shapes are not irregular. Consequently, the City's evidence is uncontroverted on these issues, and Plaintiffs in this case, unlike the plaintiffs in *Shaw*, cannot obtain strict scrutiny based solely on the bizarre shape of the districts.

Miller v. Johnson. -- The Supreme Court subsequently clarified that a district's bizarre shape is only an indicator, not a mandatory element, of an equal protection claim. *Miller v. Johnson*, 515 U.S. 900 (1995). The Supreme Court held that the burden of proof is on the plaintiff:

> to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can "defeat a claim that a district has been gerrymandered on racial lines."

Id. at 916. The legislative body developing and adopting the redistricting plan is entitled to a presumption that it acted in good faith. *Id.*

Bush v. Vera -- More recently, the Supreme Court specifically recognized that race properly may be taken into account in districting decisions and that districts which contain a particular racial majority are not *per se* equal protection violations. *Bush v. Vera*, 517 U.S. 952, 116 S.Ct. 1941, 1951 (1996). The Supreme Court also recognized incumbency protection as a traditional districting principle. *Id.*, 116 S. Ct. at 1952. Regarding the bizarre shape of the districts at issue in *Vera*, the Supreme Court noted that the districts were not only bizarre in shape, "they also exhibited utter disregard of city limits, local election precincts, and voter tabulation district lines." *Id.* at 1959. The Supreme Court held that "[e]lectoral district lines are 'facially race neutral,' so a more searching

inquiry is necessary before strict scrutiny can be found applicable in redistricting cases than in cases of 'classifications based explicitly on race.'" *Id.* at 1951.

B. The City's Evidence

The City has presented relevant, probative evidence that it considered and balanced traditional districting principles in developing and adopting the 1997 redistricting plan. The City has attached the following as exhibits to its Motion for Summary Judgment on the Fourteenth and Fifteenth Amendment Claims [Doc. # 57]: (1) memoranda from the City's outside attorneys regarding the legal requirements for districting plans (Exh. 1); transcripts of City Council meetings relating to consideration of the redistricting issues (Exh. 2); the City's Resolution 97-10 setting forth the criteria upon which the 1997 redistricting plan is to be based (Exh. 3); the report to City Council by Jerry Wood ("Wood"), the individual with primary responsibility for developing the 1997 redistricting plan, including the report prepared by the City's expert, Dr. John Alford (Exh. 4); Wood's declaration regarding demographic analysis and the factors considered in developing the plan (Exh. 11); Dr. Alford's declaration regarding the retrogressive effect of including Kingwood in District B (Exh. 15); and excerpts from the deposition of Wood (Exh. 17) and Dr. Ronald Weber, Plaintiffs' expert (Exh. 18). The City has also presented an excerpt from the deposition of Dr. Michael Maggiotto, another expert retained by Plaintiffs (Attachment A to City's Reply) [Doc. # 77].

Opinions of Counsel. -- The City's outside counsel, in a memorandum to the mayor and council members dated February 21, 1997, advised the City regarding the Supreme Court's decisions in *Shaw* and those cases which followed. The memorandum included a thorough discussion of the competing

requirements of the Voting Rights Act and the Fourteenth Amendment. There is no evidence that counsel's legal advice was incorrect, or that this advice of counsel was disregarded by Wood and the City Council in developing the 1997 redistricting plan.

Redistricting Resolution. -- City of Houston Resolution No. 97-10 established the criteria to be used in developing the redistricting plan. The Resolution provided that geographic boundaries should be followed if possible, and that communities of interest and neighborhoods should be maintained intact. The Resolution also provided that, to the extent possible, the new council districts should be composed of whole county voting precincts and should remain similar to the existing council districts. The goals of maintaining council districts of relatively equal size and preserving incumbent-constituency relations were expressed. The Resolution also recognized the importance of compactness and contiguity, providing:

> The districts should be compact and composed of contiguous territory. Compactness and contiguity, however, involve a functional as well as a geographic dimension. This functional dimension may take on added weight in situations in which geographic compactness may not be possible in light of the fact that some areas are attached to the remainder of the city only by relatively long and narrow strips of land. Functional compactness and contiguity includes, but is not limited to, consideration of factors such as
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> • the availability of transportation and communication.

• the existence of common social and economic interests.

• the ability of the citizens of a council district to relate to each other and to their representative on the council and the ability of the council member to relate effectively to his or her constituency.

• the existence of shared interests.

Resolution 97-10, Exh. 3 to Motion for Summary Judgment, at § 2(f).[10] As the final criteria, the Resolution noted that the "plan should be narrowly tailored to avoid retrogression in the position of racial minorities and language minorities as defined in the Voting Rights Act with respect to their effective exercise of the electoral franchise." *Id.* at § 2(h).

Wood's Report to City Council. -- In a report dated March 28, 1997, Wood described the considerations which were involved in the development of the 1997 redistricting plan and how the plan's design complied with the criteria set forth in

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10 The concept of functional compactness was recognized by a three-judge federal court in the Eastern District of California in *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994), which was summarily affirmed in relevant part by the United States Supreme Court, 515 U.S. 1170 (1995). The Court recognizes that the three-judge court's opinion in *DeWitt* is not binding authority, and the Court's decision herein is not dictated by the Supreme Court's summary affirmance. *See Mandel v. Bradley*, 432 U.S. 173 (1977). The Court is persuaded, however, that the concept of functional compactness is an appropriate districting principle to be considered by legislators in developing districting plans in situations, such as presented in this case, in which true geographical compactness is not feasible because of the configuration of the area being districted.

Resolution 97-10.[11] None of the changes in the 1997 redistricting plan removed an incumbent council member from his district. The 1997 redistricting plan made changes which replaced local street boundaries with major thoroughfares, such as the Katy Freeway, or with other major geographic boundaries, such as Buffalo Bayou. Several neighborhoods were reunited. Communities of interest were maintained. Most significantly, Kingwood, a large, upper-middle-class, planned community, was included, intact, in a single district. No county voting precincts were split. The new plan retained, to the extent possible, the existing council districts. The greatest territorial change was to District E, which retained two-thirds of the existing district's population. The variation from the most populous district to the least populous under the 1997 plan was 8.6 percent.

All of the districts in the 1997 redistricting plan contain contiguous territory, although the contiguity is at times based on narrow corridors which are characteristic of the irregular boundaries of the City. The Kingwood area is connected to District E by an eight mile section of canal. The land on either side of the canal, however, is not City property and could not be used as part of any council district. The alternative, including Kingwood in District B, would have involved a similar narrow connector of approximately 9-1/2 miles.

Consideration of other factors indicated a much stronger community of interest between Kingwood and the remainder of District E, particularly Clear Lake City, than between

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11 Additionally, in his Declaration and during his deposition, Wood described the considerations involved in the decision to include Kingwood in District E rather than in District B. Attached to the Declaration are maps and demographic analyses of the 1997 redistricting plan, the 1995 redistricting plan, and the 1996 annexations.

Kingwood and the remainder of District B. Clear Lake City, like Kingwood, is a large planned community. Both are inhabited predominantly by well-educated, upper middle class residents who vigorously opposed annexation into the City. As noted by Wood in his report:

> [Kingwood and Clear Lake City] share common issues in the delivery of municipal services, which Kingwood does not share with the balance of District B. Kingwood and Clear Lake City are master planned communities with a system of small area community associations with umbrella area associations to address community-wide services and issues. Both have extensive systems of private parks and recreation facilities. . . . Both communities have privately owned and maintained trail systems with similar security and maintenance issues. Both communities choose to handle solid waste pick up locally through sponsorships. They share an interest in maintaining the City's policy on sponsorships and in future increases in sponsorship subsidies. (No other District B neighborhood uses a sponsorship for solid waste pick up.) The infrastructure in both Clear Lake City and Kingwood is relatively new, and is built to high standards.

Wood Redistricting Report, Exh. 4 to Motion for Summary Judgment, at 5-6.

With reference to the retrogression issue, Wood reported, based in part on the expert opinion of Dr. Alford attached as an exhibit to Wood's report, that the inclusion of the Kingwood area in District B would have a potentially retrogressive effect on African-Americans in District B and would have a more

significant retrogressive effect on Hispanics in Districts H or I.[12] Another aspect of Section 5 considered by the City Council was the disruptive effect a Section 5 challenge would have on City elections. As discussed by the Mayor and counsel for the City, if a plan is not precleared under Section 5 of the Voting Rights Act, there can be no elections held using that plan. Transcript of April 9, 1997 Public Hearing, attached as Exhibit 2(C) to the City's Motion for Summary Judgment [Doc. # 57], at 45.

Dr. Alford's Report and Declaration. -- The City has also submitted the Declaration of Dr. Alford regarding the likelihood of a retrogressive effect caused by the inclusion of Kingwood in District B and the resulting changes to Districts H and/or I which would result. Dr. Alford, a tenured professor of political

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12 "Retrogression" (*i.e.*, the act of moving backwards to an earlier and usually worse condition, *see* THE RANDOM HOUSE DICTIONARY (unabridged), at 1225) is a term first used in *Beer v. United States*, 425 U.S. 130, 141 (1976). In *Beer*, the Supreme Court held that the purpose of Section 5 of the Voting Rights Act is "to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Id.* Later, cases further elaborated: "Retrogression, by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan." *Reno v. Bossier Parish School Bd.*, ___ U.S. ___, 117 S.Ct. 1491, 1497 (1977). "Under § 5, then, the proposed voting practice is measured against the existing voting practice to determine whether retrogression would result from the proposed change." *Holder v. Hall*, 512 U.S. 874, 883 (1994). The City's existing plan at the time of the 1997 plan's development and adoption was the 1995 plan, which had been precleared by DOJ and was currently in effect. Although Plaintiffs argue that prior plans, beginning with the 1991 redistricting plan, were constitutionally defective for the same reasons they challenge the 1997 plan, it is uncontroverted that the 1995 plan has not been held unconstitutional and, as a result, it is the proper benchmark. *See Abrams v. Johnson*, ___ U.S. ___, 117 S.Ct. 1925, 1938-39 (1977). Moreover, Plaintiffs provide no probative evidence that the 1991 or 1993 plans were discriminatory.

science at Rice University, also determined that the proposed redistricting plan involved a "tradeoff of several traditional districting concerns. Concern for minimizing disruption of existing district lines, non-retrogression, and authenticity are balanced here against the concern for geographical compactness." Assessment of the City of Houston's Proposed District Plans, attached to Wood Report, Exh. 4 to Motion for Summary Judgment, at 12.

Dr. Alford discussed the major similarities between Kingwood and Clear Lake City. Dr. Alford also noted that the lack of precise geographical compactness was not the result of "block-picking" but was, instead, the result of "exterior boundaries of the city itself [which] are not smooth," and an "annexed area [which] is connected to the city by a narrow corridor." *Id.* at 13-14. Dr. Alford determined that "any district that contains Kingwood will necessarily appear non-compact in its outline. This is a function of the boundaries of the city and the annexed area. The narrow corridors of these plans are narrow because the city itself is narrow at those points. . . . In this case the narrow corridors can not be widened without moving outside the city limits. Any districting plan will have to incorporate these narrow corridors into one or more of the nine districts." *Id.* at 14. Dr. Alford concluded that "the proposed plans are a clearly acceptable balancing of traditional districting concerns. No plan will be optimal on all fronts simultaneously." *Id.*

Plaintiffs' Opposition to Wood and Alford Reports. -- Plaintiffs argue that the Wood and Alford reports should not be considered significant, citing cases which involve reports prepared for litigation and not available to the decision-making body for use at the time the redistricting plan was adopted. Specifically, Plaintiffs cite *Shaw v. Hunt*, 517 U.S. 899, 116 S. Ct. 1894, 1903 (1996), in which two reports "prepared for the litigation" were deemed irrelevant because they "were not

before the General Assembly when it enacted" the districting plan. Plaintiffs also cite *Vera v. Richards*, in which the district court gave little value to a demographic study compiled "specifically for this trial" where there was "no evidence that the information it contained was available to the Legislature in any organized fashion before [the challenged district] was created." *Vera v. Richards*, 861 F. Supp. 1304, 1338 (S.D. Tex. 1994), *aff'd* 517 U.S. 952 (1996).

The undisputed evidence establishes that the Wood and Alford reports were prepared prior to the City Council's consideration of the 1997 plan. While perhaps these reports were prepared with an awareness that litigation was likely, they were available to City Council for consideration in reaching its decision on redistricting, and were not prepared as an afterthought during litigation. The Court finds that the Wood and Alford reports are competent summary judgment evidence and rejects Plaintiffs' argument that they should not be considered.

Transcripts of Public Hearings. -- Public hearings on the redistricting were held February 26, 1997, April 2, 1997, and April 9, 1997.[13] At the public hearing on February 26, 1996, citizens of the City spoke in favor of and against the City's redistricting plan. Wood subsequently considered the various comments and either made changes to the plan or explained why

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13 Transcripts of the hearings are attached as Exhibits to the City's Motion for Summary Judgment [Doc. # 57]. The transcript of the public hearing held February 26, 1997, is Exhibit 2(A), the April 2, 1997, public hearing transcript is Exhibit 2(B), and the April 9, 1997, public hearing transcript is Exhibit 2(C) (herein cited as Hearing Tr., Exh. 2(*), at *).

the change could not be accomplished.[14]

The public hearing transcripts also reflect that the City Council carefully considered the proposed plan and the feasibility of various modifications. The possibility of splitting Kingwood between two districts was considered and summarily rejected because it would not conform with the redistricting principle that neighborhoods should not be divided. Hearing Tr., Exh. 2(A), at 13. Adding Kingwood to District A was considered, and it was determined that it would be too disruptive to the other districts because District A was already near the maximum population limit and the addition of approximately 50,000 additional residents to District A would require that approximately 50,000 residents of District A would have to be moved to another district, requiring significant changes throughout the City. Hearing Tr., Exh. 2(B), at 10-11, 57-58. The addition of Kingwood to District B was determined to be potentially, if not probably, retrogressive under Section 5. Hearing Tr., Exh. 2(B), at 10.

The transcripts of the public hearings also establish that the City Council had before it no alternative citywide plan for consideration. Wood's task, as it had been for past redistrictings, "was for staff to present the plan that best describes or meets the criteria as staff can produce it and under the direction of the legal department, rather than alternate plans." Hearing Tr., Exh. 2(C), at 31. A proposal referred to as the "Polyansky-Stetson Plan," submitted on behalf of Plaintiff Blum and others, was not a citywide plan; rather, it was simply a map showing the inclusion of Kingwood in District B with all other districts

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14 For example, a citizen complained during the February hearing that Precinct 1106 was located in District H. Hearing Tr., Exh. 2(a), at 111-12. As a result of Wood's consideration of those comments, Precinct 1106 was removed from District H. Hearing Tr., Exh. 2(B), at 9-10.

remaining blank. Hearing Tr., Exh. 2(B), at 55. City Council, when discussing the Polyansky-Stetson Plan, noted negatively that the "Plan" was not a citywide proposal, placing Plaintiffs on notice of the City Council's concerns and questions. However, no proposals addressing the complexities of dealing with the remaining districts from the plan were presented to City Council by the April 9, 1997 hearing and vote. Hearing Tr., Exh. 2(C), at 15. Indeed, Plaintiffs have not submitted an alternate citywide plan in opposition to the Motions for Summary Judgment.[15]

C. **Plaintiffs' Evidence**

To avoid summary judgment on their Fourteenth and Fifteenth Amendment claims of racial gerrymandering, Plaintiffs must present evidence to raise a genuine issue of material fact regarding whether race was the *predominate* consideration to the *subordination* of traditional districting principles. In an effort to satisfy this burden, Plaintiffs rely on the evidence submitted in support of their prior request for a preliminary injunction, as well as the following exhibits which are attached to their Opposition to the City's Motion for Summary Judgment [Doc. # 67]: declarations (Exh. A and Exh. B) and deposition excerpts (Exh. H) ("Weber Depo.") of Dr. Ronald Weber, Plaintiffs' expert; deposition excerpts of City Council Members J. W. Roach, Jr. (Exh. D) and O. Sanchez (Exh. E); the declaration of Dr. Maggiotto (Exh. I); reports regarding the City's 1991 redistricting plan (Exh. F and Exh. K); and a portion of the letter from the City's counsel to the Department of Justice

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15 The Court notes that Plaintiffs do not have an evidentiary burden in this suit to create and propose a complete alternative redistricting plan. However, their failure to clarify this proposal for City Council reduced the relevance and probative value of the putative plan when it was suggested since the City had to consider numerous and sometimes competing constitutional factors in designing a city-wide redistricting plan.

regarding preclearance of the 1996 annexations (Exh. J). Plaintiffs attach to their Surreply a Third Supplemental Declaration of Dr. Weber (Exh. A), a North Carolina districting plan (Exh. B), a Memorandum Opinion from the Eastern District of North Carolina (Exh. C), and the United States Supreme Court's denial of a stay in the North Carolina case (Exh. D). Plaintiffs also argue in their Response that the decision of certain City Council Members to invoke legislative immunity is evidence that their testimony would be detrimental to the City's position in this case.

Dr. Weber's Reports and Deposition. -- Plaintiffs' expert, Dr. Ronald Weber, expresses the opinion in his original report,[16] in supplemental declarations, and in his deposition testimony that the City's 1997 redistricting plan used race and ethnicity as predominant factors to the subordination of race-neutral traditional districting principles. Weber Report, Exh. 7A, at 31-32. The primary basis for his opinion involves a history of City districting in the 1990s. Following the 1990 census, the City adopted its first redistricting plan in June 1991. The Department of Justice ("DOJ") objected to the plan, and the City responded with the adoption of a plan (referred to as "Plan 3") which included two Hispanic-majority districts, H and I. This plan received DOJ preclearance on October 12, 1991, but was never used in City elections because a federal judge ordered that the November 1991 elections be conducted pursuant to the original plan to which DOJ had objected. Weber Report, Exh. 7A, at 11-12.

It is Dr. Weber's opinion that the 1991 plan was based predominantly on race because it was developed to satisfy DOJ

16 Dr. Weber's original report was attached as Exhibit 7A to Plaintiffs' Motion for Preliminary Injunction [Doc. # 29] (herein cited as "Weber Report, Exh. 7A, at *").

requirements when the City should instead have "gone to the district court of the District of Columbia and . . . gotten preclearance from that court rather than going to the overly zealous Department of Justice at the time in 1991." Weber Depo., at 94. Based on his opinion that the 1991 plan was race-based, Dr. Weber further opines that "everything after that is invalid because it is dominated by race . . . by the '91 decision." Weber Depo. at 93.[17] Indeed, Dr. Weber declines to consider the retrogressive effect on District H of a redistricting plan which includes Kingwood in District B because, in Dr. Weber's opinion, the City should not have created District H in 1991, so "the City didn't need to worry about the impact on District H." Weber Depo. at 107.

Dr. Weber conceded in his deposition that he did not consider idiosyncratic factors, such as where an incumbent's relatives reside or where certain institutions are located. Weber Depo. at 25. Dr. Weber also stated in his original report that he did not consider other criteria relied upon by the City in developing the 1997 redistricting plan. Specifically, Dr. Weber did not consider the City's interest in maintaining existing districts because the existing districts were established in the 1991 plan which Dr. Weber believes was race-based. Dr. Weber also did not consider certain aspects of the community of interest criteria, such as income, education, and automobile ownership versus public transportation, because these aspects could be correlated with

17 Dr. Weber's opinion that any plan based on the 1991 districting plan would be unconstitutional as based on race would require that the City have created a new "scorched earth" plan in 1997. As noted previously, this would be inconsistent with the criteria that existing council districts be maintained to the extent possible. Moreover, as noted by Dr. Alford in his Assessment of the City's Proposed District Plans, it would be inefficient to develop an entirely new districting plan at this point because the 2000 census "will require a major reapportionment-based redistricting." Exh. 4 to Motion for Summary Judgment, at 14.

race and, therefore, Dr. Weber deemed them also based on race. Weber Report, Exh. 7A, at 27-28; Weber Depo. at 195.

Dr. Weber's opinion that the 1997 redistricting plan used race as the predominant factor is also based on his opinion that the inclusion of Kingwood in District B would not be retrogressive to African-Americans in District B. Weber Report, Exh. 7A, at 26. It is Dr. Weber's belief that modifications to a district which reduce the voting age population of a minority from a level at which its ability to elect candidates of choice is "safe" to a level at which the outcome is a "toss-up" is not retrogressive. Weber Depo. at 48. It is Dr. Weber's opinion that the City should have conducted an analysis and devised a redistricting plan which reduced the percentage of minority population to "a lower number that's closer to what [Dr. Weber finds] is the threshold at which blacks have an effective opportunity to participate." Weber Depo. at 37.

Plaintiffs have cited no authority for this position that the City violates the United States Constitution unless it creates districts which contain the lowest population of minorities necessary to permit them to participate in the electoral process. Indeed, Dr. Weber conceded that the Constitution, as interpreted by the Supreme Court in *Shaw* and the cases which followed *Shaw*, requires that the City not create districts that are based predominantly on such racial considerations. Weber Depo. at 226.[18]

Although Dr. Weber's opinion may raise a genuine issue of material fact regarding the retrogressive effect on African-Americans of a redistricting plan which includes Kingwood in

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18 Plaintiffs have recently stated "emphatically" that they do not adopt this argument expressed by Dr. Weber. Plaintiffs' Surreply, at 3.

District B, it fails to raise a genuine issue of material fact regarding the City's permissible consideration of retrogressive effect as a districting principle and its reasonable concern that retrogression would result from the placement of Kingwood in District B. Dr. Weber's opinion also fails to raise a genuine issue of material fact regarding whether race was the predominant factor in the development of the 1997 plan and that traditional districting principles were subordinated to considerations of race.

Moreover, to the extent Dr. Weber's conclusions rely on the premise that this Court should reconsider the constitutionality of and the City's intentions in creating the 1991, 1993, and 1995 districting plans, the Court rejects the premise. Those plans are not before the Court for evaluation of that nature, and there is no legal basis of which the Court can conceive to permit the review of plans that have become final and have been reviewed to the extent necessary by law.

Statements by City Council Members. -- Plaintiffs also present the deposition testimony of two City Council Members, J.W. Roach, Jr. and O. Sanchez.[19] Roach testified that race was a "big criterion in redistricting around here." Roach Depo. at 30. Although Roach testified that he believed race was the deciding factor, Roach Depo. at 59-60, he conceded that it was simply his opinion. Roach Depo. at 71. Sanchez testified similarly that he considered race to have been the deciding factor, stating that he believed Kingwood would have been included in District B if Kingwood had been predominantly African-American or if

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19 Council Member Roach's Deposition Transcript ("Roach Depo.") is attached as Exhibit D to Plaintiffs' Opposition to the City's Motion for Summary Judgment [Doc. # 67]. Council Member Sanchez's Deposition Transcript ("Sanchez Depo.") is attached as Exhibit E.

District B had been predominantly poor Anglos. Sanchez Depo. at 31-32.

The Court notes initially that both Roach and Sanchez opposed the City's 1997 redistricting plan. It is clear from these Councilmen's deposition testimony, which the Court has no reason to find incredible, that they believed that the 1997 plan constituted racial gerrymandering. As a result, they appropriately voted against the plan. The opinions of Roach and Sanchez, however, are simply their individual lay opinions and are not admissible evidence.

Moreover, the opinions of individual council members are not material; the relevant inquiry concerns the intent of the City through its City Council as a legislative body. The City Council Public Hearing transcripts reflect that the council as a legislative body did not consider race the only determining factor:

> COUNCIL MEMBER SAENZ: . . . Has there ever been any discussion by this administration, or anyone on council, that says that race is to be the only determining factor here, a request that says we need to divide this based on race only?
>
> MR. HEATH: No one has made any suggestion like that to me. I am not aware of one, and I would be surprised.
>
> * * * *
>
> COUNCIL MEMBER SAENZ: So it's just not race; and there has never been any discussion, at this table or anywhere else, that is solely based on race. Is that my understanding?

> MR. HEATH: That is correct.

Hearing Tr., Exh. 2(C), at 19, 23.

> MAYOR LANIER: . . . the factors [Council Member Castillo] mentioned were actually the factors, and others like them, that were discussed by me with the staff and Mr. Heath as we looked at this redistricting question; and the only way race came up was the connection with the restriction against regression (sic) as set forth in the Voting Rights Act. . . . there was never a suggestion that we should use race as a global criteria.

Hearing Tr., Exh. 2(C), at 54-55. Plaintiffs' evidence that two or three council members believed race was the "big criterion" does not raise a genuine issue of material fact as to the basis for the City's adoption of the 1997 redistricting plan.

Dr. Maggiotto Opinion. – A second expert retained by Plaintiffs, Dr. Maggiotto, expressed the opinion that District E in the 1997 redistricting plan is not geographically compact. This issue is undisputed by the City but, as discussed previously, any district which includes Kingwood would not be geographically compact because the annexed area is not geographically compact to the remainder of the City. Consequently, Dr. Maggiotto's opinion regarding compactness addresses only an undisputed issue.

Dr. Maggiotto also expresses his opinion that "the claim that Houston districts may represent homogeneous communities of interest is undermined by the variability observed across socioeconomic variables commonly used to stratify populations" and that "the particular claim that District E represents a

homogenous community, whose common interests support significant departures from district compactness is doubtful." Maggiotto Report, Exh. I, at 14. Initially, the Court notes that Dr. Maggiotto's opinion is based entirely on his review of certain data provided to him by Plaintiffs. There is no indication in the record that Dr. Maggiotto visited either Kingwood or Clear Lake City or that he interviewed residents of either community regarding their relevant interests.

More importantly, there is no claim by the City that District E represents a "homogenous community." The City's decision to include Kingwood in District E rather than in Districts B or A was based, in part, on its determination that Kingwood shared a *greater* community of interest with Clear Lake City than it did with other contiguous districts. Dr. Maggiotto's opinion does not dispute this determination. Indeed, the only comment by Dr. Maggiotto on this point is that Kingwood would be "equally at home" in District G. Maggiotto Report, Exh. I, at 13. District G, however, is located in the western part of the City, while Kingwood is in the far northeastern region. In any event, District G has no land contiguous with Kingwood.

Finally, Dr. Maggiotto's statistical analysis of certain data and his resulting opinion that District E is neither compact nor homogenous is not relevant to the issue before the Court. Dr. Maggiotto testified that his report does not address whether race was the predominate factor in the City's plan. Maggiotto Depo., Exh. A to City's Reply [Doc. # 77], at 94. As a result, the evidence presented by Dr. Maggiotto fails to raise a genuine issue of material fact regarding whether the 1997 redistricting plan constitutes racial gerrymandering.

Evidence Regarding 1991 Plan and Kingwood Annexation. -- As discussed previously in connection with the opinions of Dr. Weber, the development of the 1991 plan, even if based on

race as the predominant consideration to the subrogation of all other districting principles, is not relevant to the issue before the Court regarding the 1997 redistricting plan. The issues regarding preclearance of the Kingwood annexation are likewise irrelevant to whether the 1997 redistricting plan violates Plaintiffs' constitutional rights.

Claim of Legislative Immunity. -- During discovery in this case, Council Member Martha Wong filed a Motion to Quash Subpoena [Doc. # 45] invoking her legislative immunity. Plaintiffs argue the decision by Council Member Wong and other council members who voted in favor of the adopted plan to invoke legislative immunity is evidence that their testimony would have been detrimental to the City's position and would have supported Plaintiffs' position. This argument is unpersuasive.

As noted by the Court in its order granting Council Member Wong's Motion, legislative immunity exists to protect the workings of the legislature from intrusion by the judiciary. Order [Doc. # 49], at 2, *citing Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). The Court also noted that "confidential communications among legislators in conducting legislative business is an essential element of our system of government, a system which is to be fostered and protected by the community. . . . damage to the legislative process if the legislators were required to disclose their own confidential communications and thoughts, as well as those of their fellow legislators, would be significant." Order, at 4. Council Member Wong's decision to invoke legislative immunity can be considered evidence of her intent to protect the legislative process as easily as it can be considered evidence of detrimental testimony.

D. Summary Judgment

The City has presented evidence which establishes that the 1997 redistricting plan was the result of careful consideration and balancing of traditional districting principles. The district shapes and the lack of precise geographical compactness are an unavoidable result of the shape and lack of compactness of the City itself. Although it is undisputed that race was a consideration, the City has presented evidence that race was not the predominant factor.

Plaintiffs have presented significant probative evidence that the City considered race an important factor in its 1997 redistricting decision. Plaintiffs have also presented evidence that certain determinations made by the City in developing the plan may have been in error. For example, it is possible that the addition of Kingwood to District B would not have resulted in actual retrogression as to African-Americans in that district. Plaintiffs have failed, however, to satisfy their burden of producing evidence which, separately or in combination, raises a genuine issue of material fact regarding their claim that race was the predominant factor to the subrogation of traditional districting principles. Plaintiffs have not presented evidence from which a reasonable jury could conclude that race was "the criterion that, in the [City's] view, could not be compromised." *See Shaw*, 116 S. Ct. at 1901.

Plaintiffs in their Surreply cite a recent opinion by two members of a three-judge court[20] in the Eastern District of North Carolina granting summary judgment for the plaintiffs in on a racial gerrymandering claim. *Cromartie v. Hunt*, No. 4:96-CV-104(BO)(3) (E.D.N.C. April 14, 1998). The Eastern District of North Carolina's decision to grant summary judgment

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20 Hon. Sam J. Ervin III, the circuit judge member of the three-judge court, issued a dissenting opinion.

for the plaintiffs on the evidence before it is no more persuasive that the Eastern District of California's decision in *DeWitt* to grant summary judgment for the legislature on the evidence in that case. The Court's decision can be based only on the evidence presented by the parties in this case as it relates to the City's 1997 redistricting plan.

Based on the foregoing, the City is entitled to summary judgment on Plaintiffs' Fourteenth and Fifteenth racial gerrymandering claims.

VIII. CONCLUSION

Plaintiff Blum is no longer a resident of the City, and Plaintiff Vera is not a properly registered voter in District H and is not registered in any other district. As a result, these two Plaintiffs lack standing in this litigation for prospective relief and will be dismissed by separate order.

Plaintiffs have failed to identify any individual injury to the secrecy of their ballots. Similarly, Plaintiffs have failed to allege individual harm which would satisfy the standing requirement as to their First Amendment and Equal Protection claims. Based on total population figures, the districts in the 1997 redistricting plan are within a ten percent population differential which complies with the holding of the United States Supreme Court in *Connor v. Finch*, 431 U.S. 407, 417-18 (1977). Absent probative evidence of intent, Plaintiffs have failed to raise a genuine issue of material fact regarding their one-person, one-vote claim.

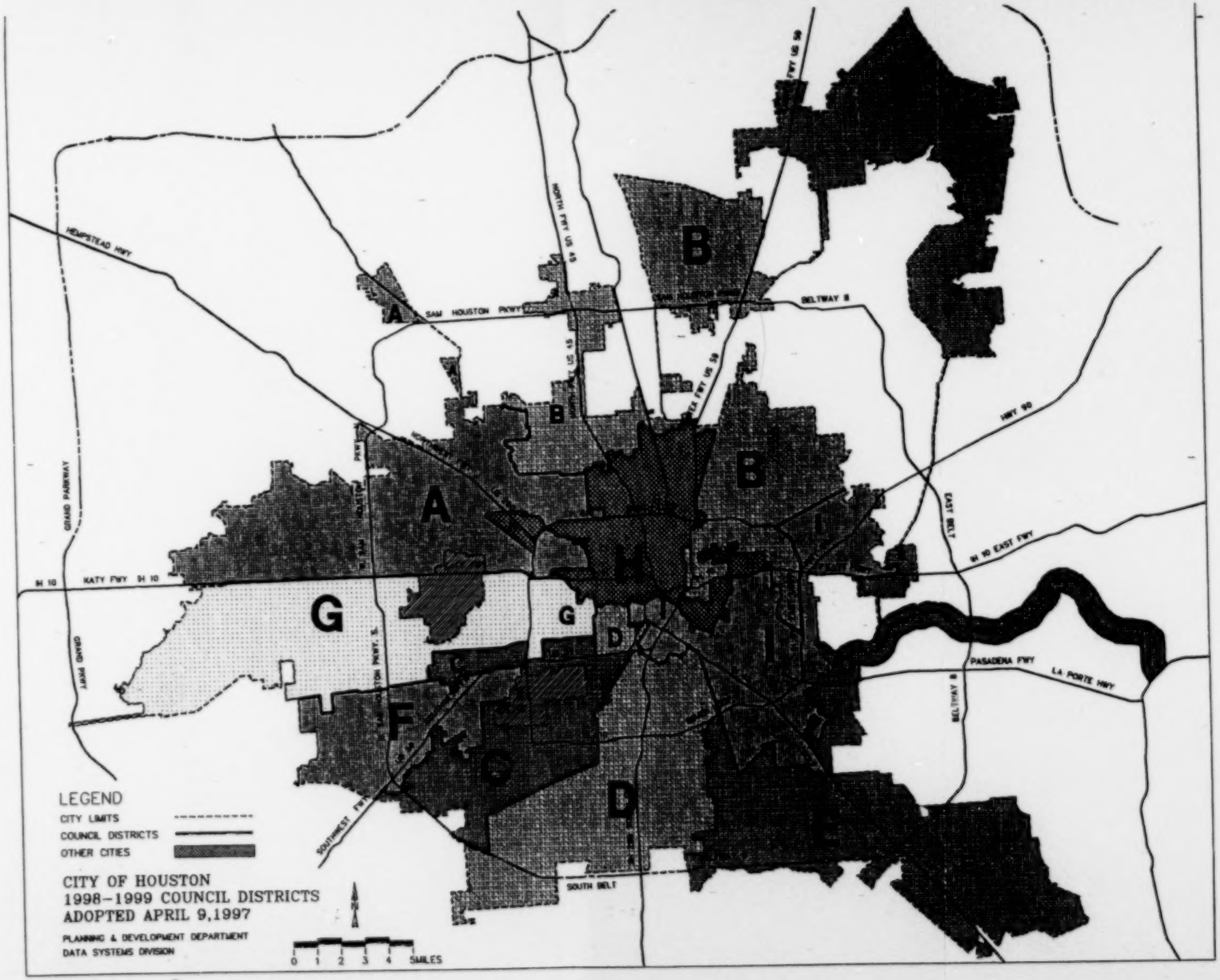
The City has presented significant evidence that the 1997 redistricting plan adopted by the City Council was based on consideration and balancing of traditional districting principles including, but not dominated by, race. Despite arduous

argument and evidence with certain superficial relevance proffered by Plaintiffs, the Court concludes after close analysis that Plaintiffs have failed to present evidence that raises a genuine issue of material fact regarding their allegation that race was the predominant factor in the City's 1997 redistricting plan to the substantial derogation of traditional districting principles. The City is entitled to summary judgment, which will be issued by separate order.

SIGNED this 6th day of May, 1998, at Houston, Texas.

s/Nancy F. Atlas
NANCY F. ATLAS

UNITED STATES DISTRICT JUDGE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PLANNING & DEVELOPMENT DEPARTMENT
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No. 99-1946

Supreme Court, U.S.
FILED
JUL 6 2000
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In The

Supreme Court of the United States

EDWARD CHEN, ET AL.,

Petitioners,

v.

CITY OF HOUSTON, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The respondents respectfully request that this Court deny the Petition for a Writ of Certiorari to review the Fifth Circuit's decision and opinion in *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000).

STATEMENT OF THE CASE

The City of Houston is required to review its council districts each two years and determine if redistricting is required. Houston City Charter, art. V, § 3. Except for the major redistricting following each decennial census, these redistrictings tend to involve minor changes such as adjusting council district boundaries to conform to changes in county voting precincts and adding territory, which generally is sparsely populated, that was annexed during the prior year. In 1997, however, the city was required to undertake a much more significant redistricting. In 1996, it had annexed Kingwood, which had a 1990 population of almost 41,000 persons. Other 1996 annexations brought the population that had to be added to council districts to 45,782 persons. Doc. 57 at 386.[1] Kingwood by itself represented approximately 22 percent of

[1] Doc. ___ refers to the district court docket number for each pleading or other document filed in the case. The page number, in this case 386, comes from the page numbers assigned to that document by the district clerk in the electronic record filed with the court of appeals. Each document is separately numbered and begins with page 1. Thus, this citation is to the 386th page of Document #57.

the population of an ideally sized city council district.[2] Thus, adding Kingwood to any existing council district was certain to bring the city council districting plan out of population balance.

The city was briefed by its legal counsel on its obligations under both the *Shaw v. Reno*[3] line of cases and under the Voting Rights Act. *Id.* at 10-18, 22, *et seq.* It followed a procedure that was designed to meet both of those obligations. The city council adopted a set of criteria for the staff to follow in drawing a proposed plan. *Id.* at 285-90. These criteria, only one of which directly related to issues of race, reflected traditional districting principles including consideration of compactness and contiguity, use of identifiable district boundaries, recognition of communities of interest and neighborhoods, achieving relative population equality among the districts, using whole voting precincts as the basic building block for districts, minimizing changes from the existing plan, keeping incumbents in their historic districts, and narrowly tailoring any plan to avoid retrogression under the Voting Rights Act. *Id.*

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[2] According to the 1990 census, the population within the City of Houston's 1997 boundaries was 1,700,473. Doc. 57 at 379. If all nine single-member council districts were equal in population, each would have 188,941 persons.

[3] 509 U.S. 630 (1993).

The overriding issue was where to put Kingwood.[4] It was, in effect, part of an "island" that was attached to the remainder of the city by long, narrow corridors such as a canal and a roadway. Pet. App. 93a. It was closest to District B, yet it was several miles from the core of that district.[5] In determining what district should receive Kingwood, the staff looked at social and economic similarities and at characteristics of the areas that affected residents' perceptions of city issues. Doc. 57 at 298-99. The plan submitted by the staff placed Kingwood in District E, thus linking the northeast and southeast portions of the city.

After the staff prepared the plan, it submitted a detailed written report showing how the plan addressed each of the criteria that had previously been adopted by the council. *Id.* at 294, *et seq.* Additionally, John Alford, a political science professor at Rice University, was retained to analyze the plan and to report to the council on how it conformed to traditional districting principles. Professor Alford concluded that the plan was an acceptable balance of traditional districting concerns. Doc. 57 at 307. He advised that the plan was not as geographically compact as might be desired; however, he noted that the

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[4] Although Kingwood is not labeled on the map of council districts included in the Appendix to the Petition, it is the northernmost part of the city and is located in the "point" at the top of the northern portion of District E. Pet. App. 93a.

[5] The city council requested and received a report that showed the northernmost point of Kingwood was 27.34 miles from the southern part of District B and 39.28 miles from the southern part of District E. Doc. 57 at 310.

non-compact shape of the city prevented *any* district containing Kingwood from being spatially compact. *Id.* at 306-07. Thus, the lack of compactness was a function of the shape of the city and was not caused by the "block-picking" that characterized the *Bush v. Vera*[6] districts that covered much the same geographic area. *Id.*

The council reviewed the staff report and the Alford analysis, debated the proposal, and ultimately adopted the plan proposed by the staff. The plaintiffs[7] filed this suit claiming, among other things, that the plan violated the doctrine established in *Shaw v. Reno*.[8] After the end of discovery, the city[9] moved for summary judgment. The district court granted the city's motion and entered summary judgment, concluding that

> The City has presented significant evidence that the 1997 redistricting plan adopted by the

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[6] 517 U.S. 952 (1996).

[7] There are twelve individual plaintiffs. They are referred to collectively as Chen, who is the first plaintiff listed in the style of the case.

[8] The other surviving claims relate to (1) whether an underpopulation of predominantly minority districts to account for the differential effect of the census undercount is actionable even when the deviation between districts fails within the judicially recognized *de minimis* range and (2) whether the Constitution requires the one person-one vote analysis to be performed after omitting children and non-citizens from the apportionment base. To the extent that any factual background is relevant to those issues, it is discussed in the next section under the points addressing those arguments.

[9] The defendants are the City of Houston, its mayor, and the fourteen other members of its city council. They are referred to collectively as the city.

> City Council was based on consideration and balancing of traditional districting principles including, but not dominated by, race. Despite arduous argument and evidence with certain superficial relevance proffered by Plaintiffs, the Court concludes after close analysis that Plaintiffs have failed to present evidence that raises a genuine issue of material fact regarding their allegation that race was the predominant factor in the City's 1997 redistricting plan to the substantial derogation of traditional districting principles.

Pet. App. 91a-92a. The Fifth Circuit affirmed, stating that

> The record is not such as to sustain a finding that race predominated in the City's decision-making. While the plaintiffs have created a valid *Shaw* claim, they failed to produce evidence that would have surmounted the summary judgment threshold.

Pet. App. 52a.

REASONS FOR DENYING THE WRIT

I. The summary judgment in favor of the city on the *Shaw v. Reno* claim presents no issue that justifies the exercise of this Court's certiorari jurisdiction.

This is simply a summary judgment case in which the plaintiff, Chen, failed to meet his evidentiary burden. The district court properly granted summary judgment for the city, and the Fifth Circuit, in a carefully considered opinion by Judge Garwood, properly affirmed the judgment.

Nothing presented in the petition justifies the exercise of this Court's certiorari jurisdiction.

A. The effect of Chen's argument is to urge this Court to abandon principles it established in *Miller v. Johnson* and to ignore the carefully and deliberately limited language of *Hunt v. Cromartie*.

Chen suggests that the Court of Appeals failed to follow *Hunt v. Cromartie*,[10] which he reads as essentially prohibiting summary judgment in any *Shaw v. Reno*[11] claim. His reading of *Cromartie* is simply wrong, and his theory ignores the fundamental difference between plaintiffs' and defendants' burdens on summary judgment in *Shaw* claims. The Court in *Cromartie* was very careful to limit its discussion to the propriety of granting summary judgment for the plaintiff in a districting challenge. *Cromartie*, 526 U.S. at 553 and n.9 ("Summary judgment *in favor of the party with the burden of persuasion* . . . is inappropriate . . . ;" "That is not to say that summary judgment *in a plaintiff's favor* will never be appropriate . . . "; "summary judgment is rarely granted *in a plaintiff's favor* . . . in a racial gerrymandering case. . . . ") (emphasis added). Here, however, the summary judgment was granted for the defendant, i.e., the city; thus, *Cromartie* does not apply. Furthermore, the defendant's burden on summary judgment is significantly lighter than the plaintiff's burden. This Court has cautioned that

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[10] 526 U.S. 541 (1999), *prob. juris noted after remand*, 68 U.S.L.W. 3783-84 (June 26, 2000).

[11] 509 U.S. 630 (1993).

redistricting must be recognized as a result of a "complex interplay of forces," that a redistricting plan must be accorded a "presumption of good faith," and that courts must proceed with "extraordinary caution in adjudicating [racial gerrymandering] claims." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). "These principles inform the plaintiff's burden of proof at trial." *Id.* The Court has emphasized that courts must consider this heightened burden and the intrusive potential of judicial intervention into the legislative realm when considering defendant's motions for summary judgment in *Shaw v. Reno* claims. *Id.* at 916-17. To claim, as Chen does, that this Court has "in essence [called] for a full development of the evidence at a trial," Pet. 11, in all racial gerrymandering claims, thus preventing summary judgment for defendants, is to ignore or misread both *Miller* and *Cromartie*.

B. Chen is asking this Court to invoke its certiorari jurisdiction to analyze the record and determine if he presented sufficient facts to avoid summary judgment.

Although Chen engages in a brief discussion of the appropriateness of summary judgment in any *Shaw v. Reno* challenge, his basic argument is that the district court and the Fifth Circuit misread the facts and that they erred in concluding that he had failed to present a fact issue on the question of whether race was the predominant factor in the districting process. Chen introduced evidence that the council districts were not perfectly compact and that the city council and staff were aware of race and considered race when they were making redistricting decisions. What he did not present, though, is evidence

that tied these facts together to show that race was the *predominant* factor. As the Fifth Circuit said:

> On this record, we cannot say that plaintiffs have carried their burden and made a sufficient showing, either circumstantially or directly, to sustain a finding that race predominated in the districting. We stress that our decision here rests largely on the evidentiary shortcomings in the plaintiffs' case.

Pet. App. 37a-38a.

Here the Fifth Circuit and the district court exhaustively reviewed and analyzed the voluminous evidence that was offered to support or oppose the motion for summary judgment. Indeed, it takes almost fifty pages of the appendix to contain the two courts' detailed analysis of the record to see if Chen crossed the threshold necessary to avoid summary judgment. Chen disagrees with those courts' view of the record, and he asks this Court to draw a different conclusion from the facts. As Justice Holmes said, however, "[The Supreme Court does] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see also Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924) (writ dismissed as improvidently granted since primary issue was whether the evidence was sufficient to establish dedication of property for public use). Although in a summary judgment the Court would not be reviewing a finding of fact, the basic issue presented in the petition is tied to determining the sufficiency of this particular set of complex and voluminous facts to meet the summary judgment threshold. That issue is of little, if any, importance to the

nation's jurisprudence and is not one that merits the exercise of this Court's certiorari jurisdiction.

II. The Court should not exercise its certiorari jurisdiction to address Chen's argument that the Constitution requires that children and non-citizens be excluded from the one person-one vote calculation.

Houston, like virtually all redistricting jurisdictions, uses total population as the standard by which it measures the size of districts. As a result, councilmembers represent roughly equal numbers of persons, but not necessarily equal numbers of voters or potential voters. Some people in a district are below the age of eighteen and too young to vote; some are non-citizens and thus ineligible to vote; some have felony convictions and are disqualified from voting. TEX. ELEC. CODE, § 11.002 (defining qualified voter).[12] In Houston, districts that are relatively equal in population are not nearly so balanced when the measure is adult citizens rather than total population. The problem is particularly evident when the council district is predominantly composed of Hispanics, since Hispanics in Houston – according to the 1990 Census – have both a lower median age and a lower percentage of citizens than the population as a whole. Chen contends that the Fourteenth Amendment's one

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[12] In addition, Texas law defines "qualified voter" to exclude persons who have been "determined mentally incompetent by a final judgment of a court." TEX. ELEC. CODE § 11.002(3). Presumably the numbers in this category are insignificant when compared to the other three disqualified groups – i.e., children, non-citizens, and convicted felons.

person-one vote guarantee extends only to adult citizens and that this Court should find Houston's predominantly Hispanic council districts to be undersized, even though they contain roughly the same population as the districts populated predominantly by non-Hispanics.

A. This Court has previously determined that the decision to include or to exclude non-citizens when measuring equality of district size is a question that is appropriately left to the legislative body.

This Court rejected Chen's contention in *Burns v. Richardson*,[13] a case that, remarkably, is never discussed in the Petition other than to note in a parenthetical that it was cited by the Fifth Circuit. Pet., 22. In *Burns*, this Court said

> Neither in *Reynolds v. Sims* nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.

Burns, 384 U.S. at 92 (footnote omitted). There is no reason for this Court to revisit its decision in *Burns*.

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[13] 384 U.S. 73 (1966).

Nor, despite the Petition's claim to the contrary, is there any circuit conflict to resolve. Chen argues that there is a conflict between the Ninth Circuit, on the one hand, and the Fifth and Fourth Circuits, on the other, concerning the inclusion of children and non-citizens in the apportionment base. The Ninth Circuit seems to say that children and non-citizens *must* be included. *Garza v. County of Los Angeles*, 918 F.2d 763, 775 (9th Cir. 1990). The Fifth and Fourth Circuits conclude that children and non-citizens *may* be included. *Chen v. City of Houston*, 206 F.3d 502, 528 (5th Cir. 2000) (Pet. App. 51a); *Daly v. Hunt*, 93 F.3d 1212, 1227 (4th Cir. 1996). There is no conflict in results; at most, there is a conflict in reasoning. This case would be decided the same way under either approach.

B. Redefining the one person-one vote calculation to exclude children and non-citizens raises serious practical problems.

There are practical reasons not to use Chen's suggested citizen-voting-age-population (CVAP) as the measure of equality among districts. To do so would effect a sea change in redistricting law and would subject most representative districts in the United States – and certainly most predominantly Hispanic districts – to reexamination and possible invalidation.

If the Court granted the writ, any decision would likely come just as state legislatures and others are drawing new districts to reflect the population shown by the 2000 census. The basic census data necessary for redistricting (generally known as P.L. 94-171 data) are required to be reported to the states by April 1, 2001. *See* 13

U.S.C.A. § 141(c). In order to complete the process in time to adopt voting precincts, to permit candidate filing, and otherwise to satisfy the mechanical provisions necessary to conduct the 2002 elections, the redistricting process begins as soon as the P.L. 94-171 data are released in spring 2001. These data, however, do not include citizenship data, which are released about a year later. Bureau of the Census, Census 2000 Data Products at a Glance (Rev. 2-1-00) (showing planned release date of August-December 2002 for Summary File 3, which contains citizenship data). Thus, if CVAP is the standard, the information necessary to draw the districts will not be available until 2002, and the first post-redistricting congressional and legislative elections[14] presumably would take place in 2004, rather than 2002.

The P.L. 94-171 data come from the census "short form," which contains six questions relating to population and is distributed to about five out of six households in the United States. Census Bureau Form D-61A. The remaining one-sixth of the households receive the "long form," which has the six short form questions plus an additional 26 population questions. Census Bureau Form D-61B. All the data released by April 1, 2001 – i.e., the P.L. 94-171 data – come from questions that are presented to 100 percent of the population. The citizenship question, though, is on the long form and is, in contrast to the

[14] Houston city council elections occur in November of odd-numbered years. Its first post-redistricting elections are scheduled for November 2001, which is the earliest practical time in Texas for an election to be held using districts drawn on the basis of the 2000 census. Most elections, including congressional and legislative elections, will be held in 2002.

P.L. 94-171 data, sample data. While the Census Bureau uses scientific methods to expand the sample so that it presents a picture of the entire population, the citizenship and other sample data are reported for much larger geographic units than the 100 percent data generally used in redistricting.[15] While CVAP can be, and is, used in voting rights contexts, it cannot be easily used to draw districts because it is reported in too large a geographic unit and it is reported about a year later than the basic redistricting data.

Further, if children and non-citizens are to be removed from the redistricting base, logic would require that the third major group of persons disqualified from voting – i.e., persons who have been convicted of a felony – be removed as well. The census, however, does not include a question regarding prior conviction of a felony. Thus, there are serious practical problems, if not insurmountable barriers, to carrying Chen's position to its logical conclusion. This Court was correct in *Burns* to recognize that the legislative body should be given some

[15] The 100 percent population data are reported at the block level. The citizenship data are reported by block group. In 1990, the Census Bureau tabulated data for 7,020,924 census blocks and 229,466 block groups. Bureau of the Census, *Geographic Areas Reference Manual* at 11-1 (Nov. 1994). Thus, on average, block groups represent a cluster of slightly more than 30 census blocks. Blocks, which are the smallest unit of census geography, can be combined to form virtually any larger geographic unit, such as the election precincts used by the City of Houston as the basis for drawing its redistricting plan. Block groups, because of their larger size, are not so versatile and, for example, cannot be readily combined to coincide with voting precincts or other traditional political boundaries.

measure of discretion when it decides the precise contours of the apportionment base.

III. The underpopulation of predominantly minority districts within the range that has been recognized as *de minimis* does not present an issue that should invoke the exercise of this Court's certiorari jurisdiction.

This Court has recognized that a redistricting plan adopted by a state or local governmental body "should not be invalidated under the Equal Protection Clause when only minor population variations among districts are proved." *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973). A deviation between the largest and smallest district of ten percent has been recognized as *de minimis*. *Brown v. Thompson*, 462 U.S. 835, 843-44 (1983). Chen asserts an Equal Protection claim when, in recognition that the census undercount disproportionately affected minorities, the city allegedly underpopulated predominantly minority districts, albeit within the ten percent *de minimis* limit. Even if the legal issue is one that this Court might believe should be addressed, it is not fully presented in this case.

A. Chen did not fully develop this issue in the district court.

This was not one of the prominent issues in the district court or the Fifth Circuit. Indeed, the Fifth Circuit disposes of it in a footnote with a reference to the "sparse record" and the failure of the plaintiffs to present sufficient facts to establish their claim. Pet. App. 40a, n. 15.

Further, the supposed deliberate underpopulation of minority districts would have occurred in 1991 or 1993.[16] The districts being challenged, however, were drawn in 1997. While the 1997 districts are derivative of the 1993 districts, the 1997 council districts do not exhibit the underpopulation levels of which Chen complains. In 1993, for example, the predominantly minority districts were the four smallest of the city's nine single-member districts. Doc. 61, p. 22. In 1997, however, the predominantly minority districts were the first, fifth, sixth, and ninth largest districts. Doc. 57, p. 379. While the smallest district was a predominantly minority district, so was the largest. The district with the median population was a predominantly minority district, as was the district immediately below the median. The predominantly minority districts were somewhat smaller than average in 1997, but a pattern of deliberate and extensive underpopulation did not exist. The facts relating to the 1997 districts do not present the issue Chen seeks to raise.

B. The issue of deliberately underpopulating predominantly minority districts to compensate for the census undercount is unlikely to occur in the future.

Underpopulation of predominantly minority districts was a common practice in the 1990's. It was well known

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[16] In Chen's response to the city's motion for summary judgment on this point, he said "the notes of the 1991 City Council committee coupled with the deviations of the 1993 plan evidence an intent to purposefully underpopulated [*sic*] certain minority districts." Doc. 68, at 9.

that minority groups had substantially higher census undercount rates than the population as a whole. *See Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 322-23 (1999). Accordingly, a slight underpopulation of predominantly minority districts was a way to recognize and account for the undercount. Following the 2000 census, though, different data will be available. The Census Bureau plans to release two sets of numbers – one an unadjusted headcount and the other a headcount that has been adjusted by use of statistical sampling to compensate for the undercount. Report of Tabulations of Population to States and Localities, 65 Fed. Reg. 38370, 38371 (June 20, 2000) (proposing a rule that would result in the release of two census counts – one that includes sample data and one that does not – by April 1, 2001, if either the Director of the Census or the Executive Steering Committee for A. C. E. Policy determined that a count produced with the use of sampling should be released); *see also* Pub. L. 105-119, 111 Stat. 2440, § 209(j) (requiring that census totals produced without the use of sampling be released). Presumably, any jurisdiction seeking to allow for the undercount after the 2000 census will have adjusted data to use.[17] Thus, the issues presented by Chen's argument are unlikely to recur and do not merit this Court's exercise of its certiorari jurisdiction.

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[17] Even if a jurisdiction uses unadjusted data as the basis for its redistricting, it can measure its districts with adjusted data as well. For example, a prudent jurisdiction might draw districts with the goal of coming within an acceptable range of deviation no matter which data set is used.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

EDWARD CHEN ET AL. *v.* CITY OF HOUSTON ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 99–1946. Decided May 21, 2001

The petition for a writ of certiorari is denied.

JUSTICE THOMAS, dissenting from denial of certiorari.

Petitioners, Houston residents, filed suit against the city of Houston and alleged that the city violated the Equal Protection Clause when it redrew its single-member city council districts in 1997. Petitioners argued that the city engaged in racial gerrymandering when it devised the 1997 plan and that the districts did not conform to the one-person, one-vote requirements articulated by this Court. The District Court granted summary judgment to the city, and the Court of Appeals affirmed. Because petitioners present an important legal question over which courts of appeals disagree, I would grant certiorari.

When drawing its 1997 districting plan, the city faced the challenge of where to place the newly annexed Kingwood suburb, an overwhelmingly white community located in the northeastern most point of Houston. Had the city added Kingwood to the adjacent District B, the city would have been forced to move a number of persons out of District B into neighboring districts to avoid making District B disproportionately large. This shifting of people from one district to another allegedly would have jeopardized the strength of several "minority" districts, those districts containing primarily voters who are black or Hispanic. Instead, at least in part to avoid disrupting these minority districts, the city made Kingwood a part of District E, a predominantly white community located in the southeastern corner of Houston. Petitioners argue that this place-

ment evidenced racial gerrymandering and that the city engaged in the systemic undersizing of "minority" districts. Simply put, petitioners contend that the city drew minority districts so that they would contain fewer people, and fewer voters, than would "majority" districts, comprising primarily voters who are white. According to petitioners, this undersizing was done directly, by making minority districts smaller in terms of total population, and indirectly, by roughly equalizing district populations without regard to the *citizen voting age* population. Because each district would have a single representative in the city council, the alleged effect of this undersizing was to dilute the value of votes in districts with larger total populations and citizen voting age populations, *i.e.* districts that in this case comprised majority white populations.

I would grant certiorari on petitioners' one-person, one-vote claim, which asks what measure of population should be used for determining whether the population is equally distributed among the districts. In *Reynolds* v. *Sims*, 377 U. S. 533 (1964), this Court held that "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Id.*, at 577; see *Avery* v. *Midland County*, 390 U. S 474 (1968) (applying *Reynolds'* one-person, one-vote holding to districting for the selection of local governmental representatives). Absolute parity of populations among districts has never been required. But "this Court has recognized that a state legislative apportionment scheme with a maximum population deviation exceeding 10% creates a prima facie case of discrimination." *Brown* v. *Thomson*, 462 U. S. 835, 850 (1983) (O'CONNOR, J., concurring); see *id.*, at 842–843 (Opinion of the Court) ("Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State" (citations omitted)). Having read the Equal Protection Clause to include a "one-person, one-vote" requirement, and having prescribed population variance that, without additional evidence, often will satisfy the requirement, we have left a critical variable in the requirement undefined. We have never determined the relevant "population" that States and localities must equally distribute among their districts.

Such a determination might be dispositive of whether the city has violated the Equal Protection Clause. If "population" means "total population," the districts in the city's 1997 plan had a less than 10% population variance. If, however, it means "citizen voting age population," the maximum deviation is allegedly anywhere from 20% to 32.5%. Pet. for Cert. 3, and n. 4. The Fifth Circuit in this case held that the decision as to which population figures to use was "a choice left to the political process." 206 F. 3d 502, 523 (2000). Likewise, the Fourth Circuit has held that the decision whether to use total population or voting age population is a political choice generally not reviewable by courts. *Daly* v. *Hunt*, 93 F. 3d 1212, 1227 (1996) ("This is quintessentially a decision that should be made by the state, not the federal courts, in the inherently political and legislative process of apportionment".) In contrast, the Ninth Circuit has held that districting based on voting populations instead of the total population would have been unconstitutional. *Garza* v. *County of Los Angeles*, 918 F. 2d 763, 773–776 (1991).

In other contexts, I might be inclined to wait for further conflict to develop among the courts of appeals. In this case, however, because every jurisdiction in the country will have to accommodate the 2000 census data in the near future, it behooves us to address this question as

soon as possible. The one-person, one-vote principle may, in the end, be of little consequence if we decide that each jurisdiction can choose its own measure of population. But as long as we sustain the one-person, one-vote principle, we have an obligation to explain to States and localities what it actually means.